In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-317

O-J TRANSPORT COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION,
Respondents,

and

ASSOCIATED TRUCK LINES, INC., BLUE ARROW-DOUGLAS, INC., CENTRAL TRANSPORT, INC., MICHIGAN EXPRESS, INC., EXPRESS FREIGHT LINES, INC., GREAT LAKES EXPRESS COMPANY, INTERSTATE MOTOR FREIGHT SYSTEM, R-W SERVICE SYSTEM, INC., and COURIER-NEWSOM EXPRESS, INC.,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner, O-J TRANSPORT COMPANY, prays that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit, entered in this case on June 4, 1976

OPINION BELOW

The initial Decision of the Administrative Law Judge is unreported (Appendix A, *infra*, page A1). The Opinion of the Interstate Commerce Commission below (Appendix B, *infra*, page A8), was reported at 120 MCC 699 (1974). The Order of the Commission, dated April 28, 1975, denying O-J Transport Company's Petition for Reconsideration, is unreported (Appendix C, *infra*, page A23). The Opinion of the Court of Appeals below (Appendix D, *infra*, page A25) has not yet been reported.

JURISDICTION

The Opinion of the Court of Appeals below (Appendix D, *infra*, page A25) was entered on June 4, 1976. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

1. Whether, in an operating rights proceeding, the Interstate Commerce Commission should have considered the factor of the minority ownership of the applicant motor carrier, within the statutorily mandated standard of "public convenience and necessity," 49 USC §307(a), as an additional basis for granting the authority sought.

2. Whether the Interstate Commerce Commission committed reversible error, in denying a motor carrier application, by not considering the useful public purpose to be served by the proposed new operation and the new operation's lack of impairment on existing carrier operations.

3. Whether the Interstate Commerce Commission's findings, in denying motor carrier authority, were not supported by substantial evidence in the record.

STATUTES INVOLVED

The Federal statutes involved are 49 USC §307(a), 49 USC §306, and 49 USC preceding §301. The applicable statutory provisions are set out verbatim in Appendix E.

STATEMENT OF THE CASE

By application filed with the Interstate Commerce Commission on April 23, 1973, O-J Transport Company (hereinafter O-J) seeks authority, as amended, in relevant part, to transport as a common carrier by motor vehicle over irregular routes:

> (1) automobile parts, between points in Genesee, Macomb, Oakland, and Wayne Counties, Michigan, on the one hand, and, on the other, Chicago, Illinois, and Janesville, Kenosha, and Milwaukee, Wisconsin . . ."

A total of fifteen (15) existing motor carriers filed protests with the Commission, in opposition to the application. Of these fifteen (15) protestants, twelve (12) presented evidence at the hearing in this matter held in Chicago, Illinois, on November 14-15, 1973.

Part I of the application was supported by Ford Motor Company (hereinafter Ford), American Motors Corporation (hereinafter American), and five (5) separate divisions of the General Motors Corporation, including General Motors Assembly Division (hereinafter GMAD), the Fisher Body Division (hereinafter Fisher), the Chevrolet Motor Division (hereinafter Chevrolet), the General Motors Parts Division (hereinafter GMPD), and the AC Spark Plug Division (hereinafter AC). Witnesses from Ford, American, and each of the five (5) divisions of General Motors testified at the hearing in Chicago in support of the application.

Testimony adduced at the hearing revealed that O-J Transport Company was owned and operated by two black businessmen from Detroit, Michigan. These two individuals had become interested in entering the trucking field, during the growth of black business generally in the United States during the late 1960's and early 1970's. In 1971, they filed their first application with the Interstate Commerce Commission, for contract carrier authority to transport malt beverages from Milwaukee to Detroit. That application was denied.

Despite this first failure, O-J filed a second application, in the spring of 1973, after receiving support from American, Ford, and General Motors. At the time of the hearing in this cause, held in Chicago, Illinois in November of 1973, O-J owned one tractor and one trailer. O-J intended to purchase four (4) additional tractors and nine (9) additional trailers, with the equipment being especially suited for the transportation of auto parts, if the application were granted. If the application were granted, O-J stated that its operation would significantly enhance the economic role which black-owned business played in the Detroit, Michigan, area, as well as fulfilling a need for black-owned businesses in the regulated motor carrier field.

A witness from the Transportation Analysis Procurement Department of Ford Motor Company, located at Dearborn, Michigan, testified on behalf of that company. Ford stated that it had a need for the transportation of auto parts from 14 specific locations in Wayne and Macomb Counties, Michigan, to two specific locations in Chicago, Illinois. Ford also had a need to transport auto parts from one origin point in the Chicago, Illinois, area to four destination points in Wayne County, Michigan, and one destination point in Oakland County, Michigan. Ford

indicated which of the protestants it was using to move the traffic, at the time of the hearing. It was also pointed out by Ford that it requires efficient and expeditious service from the carriers to which it tenders traffic, in order to maintain its extremely complex and geographically widespread operations in a smooth fashion.

Ford emphasized that it enjoys having competition in the motor carrier field, as well as having available to it a large number of carriers from which to select. It was pointed out by Ford that service between Chicago, Illinois and its Detroit area facilities was not as good as it might be, that there were periods when Ford did have service problems, and times when Ford had found the amount of equipment needed was unavailable to it. Ford indicated that it would tender a total of two to three truckloads of traffic per week to O-J, out of the some sixty total truckloads moving in both directions between the areas involved in the application. Ford believed that the granting of the application would have only a very slight effect on motor carriers presently serving it, if any, in light of the small percentage of truckloads actually moving between the involved territories which would be tendered to O-J and the vast overall volume to all destinations being tendered to the protestants by Ford.

Ford also pointed out that it had a strong commitment, as a corporation, to assist and support in whatever way possible the growth of minority owned businesses in the United States, and this commitment resulted in part in Ford's support of O-J's application. Ford also referred to its Minority Group Supplier Program, established with the objective of increasing the amount of business sourced to minority owned businesses.

Testimony at the hearing indicated that American had a need to transport auto parts from suppliers in Genesee, Macomb, Oakland, and Wayne Counties, Michigan, to Kenosha, Wisconsin, and Milwaukee, Wisconsin. American stated that it had a large consolidation depot in Detroit, from which emanated daily truckload movements of parts to Kenosha, and Milwaukee, Wisconsin. Also listed by American were the specific carriers which it was employing to move auto parts, between the points involved in this application, and it also mentioned that it had its own private carriage operation. American stated that the relatively small size of O-J's organization was attractive to it, because American believed that the greatly simplified communication lines would assist it in meeting its complex transportation requirements.

The five witnesses from General Motors appearing in support of the application each represented a separate division. GMAD possessed plants in Detroit, Michigan and Janesville, Wisconsin. At the time of the hearing, GMAD truck shipments had increased, because of increased demand and railcar shortages, and it had found that existing service was unsatisfactory, in that peak period demand could not be met by existing common carriers. Fisher had plants in Genesee County and Wayne County, Michigan. It had traffic destined for the western points named in the application, and it also emphasized that frequency of truck moves had increased, pointing once again to railcar shortages and enhanced demand.

Another General Motors Division, Chevrolet, possessed manufacturing plants in Genesee County, Wayne County, and Macomb County, Michigan. It moved auto parts to Genesee County from the Chicago area. Because of a strong demand for parts and equipment shortages, Chevrolet emphasized that it would be utilizing motor common

carrier service on certain of its parts shipments from Chicago to Genesee County. The AC witness also had offices in Genesee County, Michigan, including a manufacturing plant. It had traffic moving to western points named in the application, and stated that there was room for improvement in existing service.

Testimony was also introduced at the hearing from an official of the Small Business Administration, who referred to two executive orders issued by the President of the United States, concerning aid to economically and socially disadvantaged business enterprises, and SBA attempts to carry out the guidelines of these two executive orders.

All twelve protestants indicated an interest in protesting the auto parts segment of the application. Each of the protestants' operations were characterized generally as those of regular route carriers of general commodities. Only one of the protestants possessed authority to serve all of the points named by the supporting shippers at the hearing. The other protestants could serve, in varying degrees, certain of the origin and destination points involved in the application with the exception of one carrier, which could only handle certain traffic tendered to it by other protestants on an interline basis to or from the Michigan points involved in the application.

All of the protestants, which appeared at the hearing, introduced evidence as to the amount of equipment utilized in their respective operations. They indicated, collectively, that they operated approximately 7,600 pieces of power equipment and about 16,800 trailers, as compared to the applicant's proposed operating level of five tractors and ten trailers. The total operating revenues of the protestants, as indicated by reports on file with the Interstate Commerce Commission, indicated that the combined total

operating revenues of these twelve protestants amounted to some $528,000,000 in the calendar year 1974. The protestants indicated at the hearing that they had a need for additional traffic outbound from the Detroit, Michigan, area in order to balance their operations.

An Initial Decision was issued by the Administrative Law Judge, the fact finder presiding over the hearing, based upon the evidence adduced therein. He concluded that O-J should receive a grant of authority on the auto parts portion of its application as applied for, with the exception of only one point, Janesville, Wisconsin, which he deleted. After summarizing the evidence introduced by O-J at the hearing, the Judge made the following findings of fact:

> "Collectively, but to varying degrees, the protesting carriers can perform the transportation services sought in the instant application. However, the Ford Motor Company expressed reservations as to the adequacy of service it is receiving, and American Motors that the proposed services are of the type they preferred using. Neither of these large automobile manufactures (sic) intends to divert more than a minute portion of its available traffic from the existing carriers in the event the application were granted . . .
>
> The Administrative Law Judge concludes that the service proposed in this application will serve a useful public purpose, responsive to a public need, without endangering or impairing the operations of existing carriers contrary to the public interest . . ." Initial Decision of Judge Messer, page 3 (Appendix A, *infra*, page A5).

Thus, according to the Administrative Law Judge, public convenience and necessity mandated the operation by O-J

as a motor common carrier over irregular routes of automobile parts.

However, upon considering the exceptions of protestants and reply of applicant, Division 1 of the Commission issued a two-one decision, reversing the decision of Judge Messer, and ordering that the auto parts portion of the application be denied in full. In the dissent filed by Vice Chairman O'Neal of the Commission, it was urged that the Initial Decision of the Administrative Law Judge should be affirmed, granting O-J the requested auto parts authority.

In the majority opinion, the Commission alluded to the fact of O-J's black ownership. That opinion stated:

> "Applicant has introduced evidence concerning its ownership by members of a particular ethnic group and seems to contend that such evidence should be the basis, at least in part, for a grant of motor carrier operating authority. *Such evidence cannot play any role in a determination as to whether a grant of authority should be made herein.* This agency is required to work within the framework of the Interstate Commerce Act and that statute requires us to consider each matter in the public interest as a whole. It does not provide us with any regulatory authority to favor any one group or individual over another for any such reasons as race, creed, color, sex, or national origin. This agency is not empowered to change the legislative direction given by Congress, and any preferential treatment to a particular group or individual would be arbitrary and capricious in the absence of a legislative mandate. Therefore, in determining whether this application should be granted or denied, we will not give consideration to

the race, creed, color, sex, or national origin of any of the parties to this proceeding." 120 MCC at 703 (Emphasis added). (Appendix B, *infra*, pages A13-A14).

As support for the denial of Part I of the application, the majority noted that the protestants ". . . operate numerous units of equipment suitable for the movement of automobile parts, have extensively and apparently successfully served shippers in the past, and appear to be totally capable of meeting such needs in the future." 120 MCC at 703 (Appendix B, *infra*, page A15).

In response, O-J submitted a Petition for Reconsideration to the Commission, the protestants replied, and Division 1 then issued a Summary Order, denying the Petition for Reconsideration (Appendix C, *infra*, page A24).

Thereafter, O-J filed a Petition for Review in the United States Court of Appeals for the Sixth Circuit.[1] That Petition for Review was docketed on June 12, 1975. Nine of the protestant carriers intervened in the proceedings. Finally, on June 4, 1976, the Sixth Circuit issued an Opinion denying the Petition for Review.[2]

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1. A proceeding to suspend an Order of the Interstate Commerce Commission is brought in the Court of Appeals, pursuant to 28 USC §2321, as amended.

2. The Honorable William E. Miller died on April 12, 1976, and did not participate in the Opinion filed by the remaining two judges on the panel.

REASONS FOR GRANTING THE WRIT

This case is of massive import in determining whether the Interstate Commerce Commission, a federal administrative agency, can interpret blindly the statutes and rules under which it operates, without giving any consideration to the corresponding social effects which its decisions have on the regulatees, the shipping public and commerce generally. The decision of the United States Court of Appeals for the Sixth Circuit has, albeit regretfully, sanctioned such a course by the Commission, stating as follows:

> "This Court is aware of the problems which minority owned businesses encounter in getting established. This is particularly true in the field of motor transportation where the 'grandfather clause' insured the certification of existing carriers at a time when black business ownership was rare. Nevertheless, Congress has not chosen to require the Commission to consider minority ownership as a separate factor in determining public convenience and necessity and it is beyond our authority to impose such a requirement." *O-J Transport Company* v. *United States*, ... F2d ..... (6th Cir., 1976) slipsheet at 11.

In reaching the result that it did, the Court of Appeals relied erroneously on a decision of this Court, *National Association for the Advancement of Colored People* v. *Federal Power Commission*, ... US ....., 96 S.Ct. 1806, 48 L.Ed. 2d 284 (1976) (hereinafter *NAACP*) which affirmed a decision of the Court of Appeals for the District of Columbia, at 520 F2d 432 (D.C. Cir., 1975). Also involved intricately in this proceeding is the equally serious question of whether the Interstate Commerce Commission is to be held to its statutory mandates in the performance of its administrative functions, or whether that Commission

can exercise its administrative expertise in an arbitrary fashion unfettered by its own governing statutes and precedents. The Court below has attempted in its opinion, to provide a rationale for the agency's determination in this proceeding, despite the lack of any such reasoned basis in the agency's opinion itself.

I. The Opinion of the Court Below, in Affirming the Commission's Refusal to Consider the Minority Ownership of the Applicant, Conflicts With a Decision of This Court in National Association for the Advancement of Colored People v. Federal Power Commission, Supra, and the Decision of the Court of Appeals for the District of Columbia, in the Same Case.

The Court below relied heavily, in denying O-J's Petition for Review, on the opinion of this Honorable Court in the *NAACP* case, *supra*, as well as the opinion of the Court of Appeals for the District of Columbia in that case. Such reliance by the Court below indicates a misreading of the scope of the opinion of both this Honorable Court and the Court of Appeals for the District of Columbia, and, moreover, actually conflicts with the opinions of those Courts.

The *NAACP* case involved a request made of the Federal Power Commission to initiate rulemaking proceedings concerning alleged employment discrimination on the part of its regulatees. The Supreme Court of the United States framed the issue as whether that Commission, within the ambit of its statutory functions, had the authority to proscribe discriminatory employment practices by its regulatees. *NAACP, supra,* slipsheet at 1.

In the first instance, the O-J proceeding is not concerned with the conduct of existing regulatees, as was

the decision of the Supreme Court of the United States in *NAACP*. *NAACP* involved a rulemaking proceeding, in which the proponents of the rule even sought to have the Federal Power Commission hear individual complaints concerning employment discrimination. Involved in the present case, on the other hand, was an application for operating rights authority, and the sought-after issuance of a Certificate of Public Convenience and Necessity. The applicant, in addition to presenting traditional evidence, also asked the Commission to look at one of the effects of its past regulation, specifically the existence of discrimination, and consider this as one of the factors to be involved in determining whether or not a certificate should issue. This concerned not the general public welfare, but rather the public convenience and necessity as concerned transportation. Yet, the Commission still refused to examine this factor, even though it concerned a function with which the Commission had been charged, the issuance of operating authority and the essential conditions of economy and efficiency, as well as the appropriate provision for and best use of transportation facilities. These were specifically the tasks which the Supreme Court of the United States pointed to, in its opinion in *NAACP* v. *Federal Power Commission*, 48 L.Ed. 2d at 291.

The Commission has simply not provided this country with an efficient transportation service if, in the manner in which it has regulated the trucking industry, it has excluded substantial segments of the population from ownership of motor carriers. The Court of Appeals, in the instant case, sanctioned the Commission's refusal to even look at the effects of its own regulation, and the resultant discrimination. To do so was error. Such action by the lower court in this case deviated from the decision of this Court, and the Court of Appeals for the District of Columbia in *NAACP*. Also, to the extent that this Court

had not ruled on the specific question involved here, i.e., whether it is proper to consider minority ownership of an applicant, as a positive factor in determining whether public convenience and necessity exists, there remains an important federal question to be decided by this Court. The compelling significance of this question deserves the attention of this Honorable Court at this time.

Of course, the majority of the Interstate Commerce Commission, in the *O-J* proceeding, specifically stated that evidence of ownership by an ethnic minority cannot play *any* role in a determination as to whether a grant of authority should be made by the Commission.[3] This is clear error, and it was error for the United States Court of Appeals for the Sixth Circuit to affirm that decision.

In a case involving an application for common carrier authority, the Commission is charged with examining the evidence presented in terms of the statutory phrase "public convenience and necessity," as stated at 49 USC §307(a) where it is charged that,

> "A certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able to perform

3. This statement, by Division 1, in and of itself ignores a long line of Commission cases, where the fact that an ethnic group has required special services has been a partial basis, at the very least, for a grant of operating authority. See, for example, *Lewis Extension—Special or Chartered Parties*, 51 MCC 689 (1950); *Illing Contract Carrier Application*, 52 MCC 79 (1950); *Matura Trucking Corp. Contract Carrier Application*, 68 MCC 766 (1956); *Michigan Pickle Co. Common Carrier Application—Passengers*, 77 MCC 549 (1958); *Bracero Transportation Company, Inc.—Migrant Workers*, 78 MCC 461 (1958); *Rosenbaum Common Carrier Application*, 105 MCC 133 (1966); *Cheetah Charter Bus Service Company, Inc., Common Carrier Application*, No. MC-133573 (not printed); *Hi-Way American Common Carrier Application*, No. MC-135870 (not printed) and *Transportes Hispanos, Inc., Common Carrier Application*, 117 MCC 894 (1973).

> the service proposed and to conform to the provisions of this part, and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate *is or will be required by the present or future public convenience and necessity.*" (Emphasis supplied).

Entry into the motor carrier field is limited, in accordance with this statutory standard. Existing carriers, as they have in the instant case, can protest the granting of an application, on the basis that the purpose to be served by the proposed operation can and will be served as well by existing lines or carriers. See *Pan-American Bus Lines Operation*, 1 MCC 190, 203 (1936).

However, common carriers by motor vehicle that were in bona fide operation on June 1, 1935, and providing continuous and uninterrupted service, were able to obtain certificates without proving public convenience and necessity, under the so-called grandfather provision of the Interstate Commerce Act, i.e., 49 USC §306. Those carriers receiving the so-called grandfather certificates have then been able, since that time, to exclude new entrants in the field.

The Court of Appeals below correctly recognized that this "grandfather clause" allowed "the certification of existing carriers at a time when black business ownership was rare." *O-J*, *supra*, slipsheet at 11. According to the Court of Appeals, this made it especially difficult for a minority-owned business to become established in the motor carrier field. Although no records are kept by the Commission with regard to minority owned carriers, studies have been made on the number of minority group members employed in the industry. One study was made

by the United States Commission on Civil Rights. Volume I of that study, *To Regulate in the Public Interest* (November, 1974), stated as follows, with regard to the employment record of the motor carrier industry:

> "The trucking industry has a poor record for the hiring of minority group members and for the employment of women in other than clerical positions. Blacks constitute only 7.3 percent of total industry employment, with greatest representation in the lowest paid classifications, i.e., laborers (17.3 percent) and service workers (23.8 percent). Black participation steadily decreases with each step up the occupational ladder. Representation in each of the five white collar categories is low. Only 2.4 percent of these employees are black, with 75 percent of those in clerical positions." *To Regulate in the Public Interest, supra,* at 104.

That same study regarded the motor transportation field as one which offered substantial opportunity for entrepreneurship by minority group members. It was pointed out as follows:

> "Entry into this field requires relatively low capital investment and minimum qualification criteria. Consequently, many minority group members and females are now in a position to seek operating authority from ICC. These opportunities, however, have been severely restricted by ICC's interpretation of its licensing authority. The effects of ICC's regulation of the industry are clear: of over 15,000 certificated motor transportation companies, a miniscule number are owned totally or in part by minority group members or females." *To Regulate in the Public Interest, supra,* at 174.

The report also indicated that the ICC staff, although it kept no data on the subject, reported that there were few such firms owned by minority group members. In 1971, the Trade Association for Minority Truckers indicated that there was only one black male who had received authority to operate across the country as a common carrier. *To Regulate in the Public Interest, supra,* at page 174, footnote 510.

The same report took note of the ICC rulemaking proceeding in *Ex Parte No. 278, Equal Opportunity in Surface Transportation,* 36 Fed. Reg. 10,741 (1971), but the report noted that no final or interim action had been taken by the Commission, at the time of the report's issuance. (There has been no further action taken by the Commission to this date, some five years later, in this rulemaking proceeding, either.) The Department of Justice ultimately felt compelled to act in the area, however, because of its belief that a discriminatory hiring pattern does exist in the trucking industry.[4]

Because of these findings regarding discriminatory practices in the industry, the report concluded that the Commission should encourage minority participation by amending its licensing procedures. *To Regulate in the Public Interest, supra* at page 235. Since the outset of this proceeding, O-J has taken the legal position that it is permissible for the Interstate Commerce Commission to consider O-J's minority ownership. To consider the fact that an applicant is owned by members of a minority

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4. See *To Regulate in the Public Interest, supra,* page 107. A major suit was filed on March 20, 1974, in the case of *United States* v. *Trucking Employers, Inc.* (D.D.C., No. 74-453, March 20, 1974), with 349 employers in the industry as defendants, involving alleged discriminatory hiring practices. The original defendants in that suit included several of the protestants herein, including Associated, Blue Arrow, Central, Express, GLX, Murphy, Gateway, Liberty, and Courier.

group is only to provide them with redress from an earlier opportunity from which they were excluded, as a result of the manner in which an agency of the federal government has chosen to interpret its own regulations. That method of operation has prevented minority groups, on the whole, from entering the motor carrier field. Simply stated, ICC action has resulted in discrimination. Ironically, also, in the O-J situation, private industry has determined, on its own initiative, that it is in its corporate interest to utilize the services of O-J, a minority owned carrier. Yet, the Commission, an agency of the federal government, has proscribed the use of O-J by Ford, American, and General Motors, by denying the auto parts portion of the application.

In affirming the actions of the Commission in the instant case, the Court below relied for support on the National Transportation Policy, as set forth at 49 USC preceding §301. It is there stated that,

> "It is hereby declared to be the National Transportation Policy of the Congress to provide for *fair and impartial regulation* of all modes of transportation subject to provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to *promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers*; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, *adequate to meet the needs of the commerce of the United States*, of the Postal Service, and of the National Defense. All of the provisions of this Act shall be administered and enforced with the view to carrying out the above declaration of policy." (Emphasis supplied).

Yet, by sanctioning the Commission's decision in this case, the Court of Appeals for the Sixth Circuit has permitted the Commission to disregard these very transportation policies, as enumerated by Congress.

Specifically, if the Commission does not take account of the minority ownership of carriers, in cases such as O-J, there can be no fair and impartial regulation of all modes of transportation, for the reason that the regulation as it exists results in discrimination against ethnic minorities, including blacks, in this country. Moreover, the Commission is charged with preserving a national transportation system by highway adequate to meet the needs of the commerce of the United States. By excluding a major portion of the nation's population from ownership in the trucking industry, due to the method in which the Commission has chosen to regulate that industry, it has provided this nation with a national transportation system by highway that does not make full use of this nation's resources; i.e., the business intelligence and acumen of all segments of the population in this country, not just a part of it. As the Court of Appeals for the District of Columbia recognized in the *NAACP* proceeding, *supra*,

> "In the long run, after all, the most efficient, lowest cost production and distribution of electricity and natural gas will be that which is conducted in compliance with the laws, employment discrimination laws and other laws alike." 520 F2d at 444.

Likewise, in the trucking industry, the manner in which the Commission can provide the most efficient national transportation system, adequate to meet the needs of the commerce of the United States, is to administer a system which allows entry on the part of companies owned by all segments of the population.

If, in the administration of its laws and regulations in the past, the Commission has created a situation where de facto discrimination exists, it is the Commission's duty to take that into account, and to consider the factor of minority ownership.

To the extent that the *NAACP* opinions did address the questions involved in this case, they held that the Federal Power Commission did have the ". . . power to take into account, in the performance of its regulatory functions, *including licensing* and *rate review*, evidence that the regulatee is a demonstrated discriminator in its employer relations." 520 F2d at 435 (Emphasis supplied). Specifically, it was held that any costs which were incurred because of a regulatee's decision to practice racial discrimination were within the scope of the Commission's responsibility to prevent any such unnecessary costs from being passed along to the consumer. The Court of Appeals *NAACP* opinion listed six legitimate areas of concern, including duplicative labor costs, the costs of losing valuable government contracts, the costs of legal proceedings involving discrimination claims, the costs of strikes and demonstrations because of discriminatory hiring practices, excessive labor costs suffered because of the narrower labor force utilized, and the cost of inefficiency among minority employees demoralized by the discriminatory practices. The Court stated that the most efficient, least expensive system to produce and distribute electricity and natural gas would be one which complied fully with the employment discrimination laws. 520 F2d at 444.

The Court of Appeals concluded its opinion in the *NAACP* case with the following criticism of the Federal Power Commission:

> "If the Petitioners have been extravagant in their claims, however, the Commission has been miserly in its response. The request for the adoption of the proposed rule may have been excessive, but it is not at all clear that the Commission was free to consider that this was the only request made. It was not in any event free to deny even that request for the reason (if it was its reason) that it had no authority to promulgate any rules relating to employment discrimination." 520 F2d at 447.

The Supreme Court agreed with the Court of Appeals' conclusion on this point. As stated by Mr. Justice Stewart,

> "The Commission clearly has the duty to prevent its regulatees from charging rates based upon illegal, duplicative or unnecessary labor costs." *NAACP, supra,* 48 L.Ed. 2d at 290.

Thus, the opinions of both the Supreme Court of the United States and the Court of Appeals did not hold that it was impermissible for the Federal Power Commission to look at employment discrimination, in the performance of its statutory function. To the contrary, both courts specifically approved such an examination, to the extent that it was involved in the Commission's task of providing an efficient and inexpensive power system for this country. If employment discrimination on behalf of the regulatees in some way affected the operation or production of power in this country, it would be permissible for the Commission to examine that discrimination and take proper steps to remedy it. Indeed, the Court of Appeals stated that it was part of the Commission's regulatory function to per-

form in this manner. These cases do not stand for the proposition, as relied upon by the Sixth Circuit, that it is impermissible for a federal agency to deal with the plight of minorities in this country. Indeed, as the regulator of a transportation system which excludes from its membership a large segment of the population of this country, the Interstate Commerce Commission is obligated, within the terms of its duty to provide an efficient and economical service for the public, to take into account the factor that an applicant is minority owned.

The *NAACP* opinions, both in the Supreme Court of the United States and the United States Court of Appeals for the District of Columbia, recognized that racially discriminatory employment practices could affect directly the efficient and low cost distribution of natural gas and electricity in this country. So likewise, can a state of discrimination, with regard to entry by minority owned companies in the trucking industry, affect the preservation of a national transportation system adequate to meet the needs of the commerce of the United States. The Court below committed error, in not realizing that the public convenience and necessity involved in the granting of a certificate to O-J in the instant case affected directly transportation services received by the shipping public. It was error for it to find that:

> "It was not a proper consideration in the present case because it was totally unrelated to the transportation needs of the public." *O-J, supra,* slip opinion at 11.

This statement by the lower court in this case completely miscomprehends the breadth of the decision made by both this Honorable Court and the United States Court of Appeals for the District of Columbia in *NAACP, supra.* Neither tribunal in the *NAACP* proceedings stopped at the point that the statutory criterion "public interest" was

not a broad license to promote the general public welfare. Both went on to state emphatically that the Federal Power Commission could take into consideration a factor such as alleged racial discrimination on the part of a regulatee, in the performance of its regulatory functions.

That is exactly what O-J requested the Interstate Commerce Commission to do in this case. Involved was not a request for a proposed rulemaking procedure asking the ICC to adjudicate cases of employment discrimination on behalf of its regulatees, but rather an application for the issuance of operating rights to transport auto parts. O-J was merely requesting the Commission, as part of its determination of public convenience and necessity, to take cognizance of its minority ownership, among other factors, in making its decision. For the Commission to do so would not run afoul, in any respect, of the decisions of both this Court and the United States Court of Appeals for the District of Columbia, in *NAACP.* In fact, by determining the issue in the manner which it did, the lower court herein determined a federal question in a way in conflict with the applicable decision of this Court in *NAACP* and a decision of another Court of Appeals, in the same case.

II. The Commission, in the O-J Case, Failed to Exercise Its Discretion Within Proper Bounds, by Ignoring Several Factors in Its Tests to Be Utilized in Determining a Motor Common Carrier Application, in Contravention of Past Decisions of This Court.

The Commission traditionally has relied upon a standard which it set forth in the proceeding of *Pan-American Bus Lines Operation, supra,* in determining the existence of the statutory standard of public convenience and neces-

sity. Division 1 of the Commission, in denying the auto parts portion of O-J's application, cited the *Pan-American* proceeding, as the proper test to be utilized in determining whether the proposed operation of O-J is or would be required by the present or future public convenience and necessity. Specifically, the majority stated:

> "In considering to what extent this statutory requirement has been met, we must determine whether the new operation will serve a useful purpose, responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest." *O-J, supra,* 120 MCC at 702.

This statement is almost identical to the statement of the Commission in *Pan-American, supra,* at 203. The Commission, in the instant case, however, after citing the proper test, did not follow it. Only one of those factors—the adequacy of existing carrier service in filling the proposed purpose—was examined. A reading of the Report of Division 1 leads to the inescapable conclusion that an applicant must show inadequacy of service by existing carriers, before an application can be granted.

However, past cases have plainly held to the contrary. As stated by the Court in *Nashua Motor Express, Inc.* v. *United States,* 230 F.Supp. 646 (D.N.H. 1964),

> "These cases show that inadequacy of present service is not a term which is convertible with that of public convenience and necessity, but it is, rather, only one element to be considered in arriving at the broader determination of public convenience and necessity. In-

> deed, the very issue in the litigation has been how much significance to attach to that one element. Other elements of importance appear to be the desirability of improved service." 230 F.Supp. at 652.

Furthermore that opinion noted:

> "It has been held repeatedly that in issuing a Certificate of Public Convenience and Necessity, the ICC need not make a specific finding that present service is inadequate . . . the converse of the proposition is that the absence of the finding of inadequacy is not alone sufficient to bar the issuance of a certificate when other factors justify a finding of public convenience and necessity. The element of inadequacy is thus not the controlling one, but is to be considered along with the other factors mentioned above. Even apart from the cases cited, it appears to be the more reasonable view that the narrower conceptual element of inadequacy of present service was not intended to be imposed as a straightjacket upon the process of determining the broader interest of public convenience and necessity in the effectuation of the national transportation policy. We find nothing in the broader discussion of this policy which would urge a contrary view." 230 F.Supp. at 653.

Thus, such factors as fostering competition, *Norfolk Southern Bus Corporation* v. *United States,* 96 F.Supp. 756 (E.D.Va., 1950), *affirmed per curiam,* 340 US 802, 71 S.Ct. 68, 95 L.Ed. 590; the availability of more equipment to the shipping public, *Onley Refrigerated Transportation, Inc., Foodstuffs and Drugs,* 118 MCC 715 (1973); the furtherance of a dynamic transportation industry, *Patterson Extension—York, Pa.,* 111 MCC 645 (1970); the lack of immunity against future competition, *Chandler Trailer*

Convoy, Inc., Extension—Jackson County, West Virginia, Docket No. MC-114004 (Sub No. 125), 38 Fed. Reg. 30586 (1973); the near monopoly position of a carrier, *Frank R. Chullino Extension—Alcoholic Beverages and Related Items to Omaha,* 120 MCC 181 (1973); the better attuned nature of applicant's operation to serve the supporting shipper, *Robert E. Wood Common Carrier Application,* 120 MCC 294 (1974); the destruction of the motor carrier business of applicants if the application were not granted, *George D. Best and Harold Wilcox Common Carrier Application,* 120 MCC 551 (1974); the benefits accruing to the shipper, *Freeport Transport, Inc., Extension—Insulation,* 121 MCC 66 (1975); and advantages accruing to the public as a whole with respect to rapid fuel production and pollution control, *M. R. Rudy Graham Common Carrier Application,* 120 MCC 817 (1975). Indeed, the Commission has itself quoted the language of *Nashua, supra,* in numerous cases, such as *The Ohio River Company Extension—Lower Mississippi River,* 343 ICC 509 (1973). It is well established by Commission precedent that authority can be granted, despite the present existence of adequate motor carrier service.

Yet, in the instant case, the Commission only noted that there were no complaints of specific service failures of protestants, which protestants, collectively, held authority to meet the shippers' transportation needs to transport auto parts. However, it is submitted by the Petitioner herein that the Commission did not even begin to look at whether the new operation would serve a useful purpose, responsive to a public demand or need, and whether the service proposed would endanger or impair the operations of existing carriers contrary to the public interest. The Commission must balance all three factors, rather than consider just one. However, only the adequacy of existing service was considered in this case.

As pointed out in the statement of facts, O-J proposed to operate five tractors and ten trailers. It owned one tractor and one trailer at the time of the application. Yet, the protestants collectively operated an armada of 7,600 pieces of power equipment and 16,800 trailers. In addition, the total operating revenues of the 12 protestants amounted to $528,000,000 in the calendar year 1974.

Also, the various shipper witnesses indicated why the proposed operation would serve a useful public purpose to them. Ford pointed out why it required an efficient and expeditious service, noted that it did have service problems, and there were times when they had equipment unavailable to it. American stated that O-J's relatively small size would enhance communication in respect to the transportation it requires. GMAD noted that its peak period demand could not be met by existing carriers. Chevrolet pointed to equipment shortages. The AC witness noted that there was room for improvement in existing service. In addition to the transportation reasons noted, Ford also pointed to its Minority Group Supplier Program. Yet, the Commission gave no consideration to the evidence.

Moreover, with regard to the effect which the proposed service would have on existing carriers, it was pointed out by Ford that it would divert only a small amount of the 60 truckloads per week it had moving between the points involved in the application. Also, Ford pointed out that the *de minimis* effect of the granting of authority to O-J was supported further by the fact that Ford tendered substantial volumes of traffic to these same protestants to points not involved in the instant application.

The lower court in this case relied heavily on the finding in the majority opinion of Division 1 that the protestants had a need for additional outbound traffic from

Detroit to balance their operations. Yet, the Commission completely ignored the fact that Ford expressed a requirement to move traffic *from* Chicago *into* the Detroit area and Chevrolet had traffic moving to an assembly plant in Genesee County from the western points named in the application. This auto parts traffic could not assist the protestants in any way in balancing their operations.

The past decisions of the Supreme Court of the United States, while recognizing the expertise which the Commission brings to bear on problems before it, have also recognized that the expertise must be exercised within certain limits. In the leading case of *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 US 81, 82 S.Ct. 204, 7 L.Ed. 2d 147 (1961), the United States Supreme Court, in affirming a decision of a three judge District Court reversing an Order of the Commission, stated:

> "Had the Commission, having drawn out and crystalized these competing interests, attempting to judge them with as much delicacy as the prospective nature of the inquiry permits, we should have been cautious about disturbing its conclusion.
>
> But while such a determination is primarily a responsibility of the Commission, we are here under no compulsion to accept its reading where, as here, we are convinced that it had loaded one of its scales." 368 US at 89-90.

The Supreme Court went on to find that the standards and criteria that had been employed by the Commisssion in denying the contract carrier application of *J-T* were not the proper ones. In remanding the case, Mr. Justice Douglas, writing for the Court, continued:

> "We intimate no opinion on the merits, for it is the Commission, not the courts, that brings its expertise to bear on the problem, that makes the findings, and that grants or denies the application. Yet, that expertise is not sufficient by itself. Findings supported by substantial evidence are required." (Emphasis in original) 368 US at 93.

This same language employed by the Court in *J-T* was also utilized in the recent case of *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System*, 419 US 281, 95 S.Ct. 438, 42 L.Ed. 2d 447 (1974), in discussing the standard to review to be employed in examining a Commission decision. The Court cited *J-T*, and employed the same phraseology used in the earlier opinion. The Court, in approving of the Commission's decision in *Bowman*, concluded:

> "The Commission's conclusion that the consumer benefits outweighed any adverse impact upon existing carriers reflects the kind of judgment that is entrusted to it, the power to weigh the competing interests and to arrive at a balance that is deemed the 'public convenience and necessity' . . . If the Commission has 'drawn out and crystalized these competing interests (and) attempted to judge them with as much delicacy as the prospective nature of the inquiry permits,' . . . we can require no more. Here the Commission identified the competing interests . . ." 419 US at 293-294.

Also relevant to the Commission's handling of the *O-J* case is the language of this Honorable Court in *Burlington Truck Lines* v. *United States*, 371 US 156, 83 S.Ct. 239, 9 L.Ed. 2d 207 (1962) in which the Supreme Court reversed a judgment of the District Court, that court having affirmed the Order of the Commission. In setting aside the Commission's Order and remanding the case to the Commission, Mr. Justice White, writing for the Court, stated:

"There are no findings and analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice . . . Expert discretion is the life-blood of administrative process but 'unless we make the requirements for administrative actions strict and demanding, *expertise*, the strength of modern government, then can become a monster which rules with no practical limits on its discretion . . .'." (Emphasis in original) 371 US at 167-168.

There is no analysis in this case to justify the choice made, and it was only based upon the adequacy of existing carrier service. The Commission made no attempt to discern whether the proposed service would serve a useful public purpose. Yet, Ford, American, and five divisions of General Motors testified as to their need. Moreover, the Commission failed to make any kind of determination as to whether the proposed operation would in fact endanger the operations of these existing companies. The testimony was clear that the protestants collectively, operating some 20,000 plus pieces of equipment as opposed to a proposed 15 for the applicant, would scarcely be affected by a miniscule diversion of freight. It was not sufficient for the Commission to merely look at one part of the three-pronged test. The Court of Appeals, by sanctioning this departure from sound administrative practice, compounded the error. This inadequate analysis clearly conflicts with the standards which this Court has set down in past decisions and should be examined by this Court, with a grant of the Petition for Certiorari of Petitioner herein.

III. An Examination of the Evidence in This Case Reveals That It Is Not Supported by Substantial Evidence.

As the *J-T* and *Burlington* cases make plain, it is necessary for the decisions of the Commission to be supported by substantial evidence. The Commission's decision in the instant case was not supported by such evidence.

If, in any manner, it can be said that the Commission did consider the other two parts of its three-pronged test, it clearly erred in reaching the result which it did. Specifically with regard to whether the operations of existing carriers would be impaired, the Commission's decision would have to be based upon the conclusion that the operation of 15 pieces of equipment by applicant, if the application were granted, would, in some respect, impair the operations of carriers which operated 20,000 plus pieces of equipment. Moreover, O-J, with assets of $21,000, as evidence adduced at the hearing revealed, would, in the Commission's analysis, be endangering the operations of carriers which had total revenues in the neighborhood of $528,000,000 for the year 1974. Also, the supporting shippers had indicated that only a very small percentage of their shipments would be turned over to O-J, if the application were granted.

Thus, there was simply no basis for any Commission conclusion, explicit or implicit, that the proposed auto parts operation of O-J would endanger the services of existing carriers. Of course, as the Commission stated in its discussion of the facts in this case, relied on by the lower court in affirming the Commission's decision, the protestants noted their need for additional traffic outbound from Detroit to balance their operations, as an additional justification for the Commission's ultimate conclusion denying O-J the auto parts authority sought. How-

ever, this conclusion ignores substantially the evidence in the case. For example, Ford noted that it had a need for auto parts movements, not only from the Detroit area to the Chicago area, but also, from the Chicago area to Detroit, in the amount of 30 truckloads per week. By providing the protestants with this traffic, it would not help, in any way, their imbalance out of Detroit. The Commission completely ignored this evidence. Chevrolet, for example, also noted that it had a need to move parts and components to its assembly plant in Genesee County, Michigan, from the western points named in the application. This evidence was also ignored by the Commission in this case, despite the fact that it had convinced the initial fact-finder to recommend a grant of the auto parts authority sought. Thus, it can be said that if the Commission did make a finding with regard to potential impairment of existing carrier service, such a finding was clearly not based upon substantial evidence. The careful reading by the court below of the Report of the Commission did not uncover this lack of support in the record for the findings of the Commission. There was no substantial evidence to support the Commission's conclusion in this proceeding. The same was true of the Commission's total failure to discuss the public purpose which would be served by the granting of this application. There was simply no rational connection between the facts found and the choice made in this case.

CONCLUSION

This Court, in *NAACP, supra,* recently rendered an important decision with regard to the manner in which one federal agency should regulate in the public interest. That decision has been misconstrued by the United States Court of Appeals for the Sixth Circuit in this case. Involved herein are the rights of minority groups to participate in an entire industry, from which they are virtually excluded presently. It is a matter of substantial public importance and concern to the entire regulation of transporation in this country. Likewise, the manner in which the Commission has departed from past guidelines set down by this Court regarding its functions as an administrative agency, also deserves the attention of this Court, reflecting as it does a cavalier disregard for any practical limits on expert discretion. For these reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

INTERSTATE COMMERCE COMMISSION

INITIAL DECISION

No. MC-138676

O-J TRANSPORT COMPANY—APPLICATION

Issuance of a certificate of public convenience and necessity authorizing described operations as a common carrier of motor vehicle approved upon compliance by applicant with certain conditions.[1]

Robert E. McFarland and *William B. Elmer* for applicant.

Leonard F. Charla for intervener in support of applicant.

Rex Eames, Michael J. Wyngaard and *Joel H. Steiner* for protestants.

By John S. Messer, Administrative Law Judge:

By application filed April 23, 1973, as amended, O-J Transport Company, of Detroit, Mich., (O-J), seeks a certificate of public convenience and necessity pursuant to section 207 of the Interstate Commerce Act authorizing

1. Assembly, Fisher Body, Chevrolet, Parts and AC Spark Plug divisions.

transportation in interstate or foreign commerce as a motor common carrier, over irregular routes, of: (1) automobile parts, between points in Genesee, Macomb, Oakland and Wayne Counties, Mich., on the one hand, and, on the other, Chicago, Ill., and Janesville, Kenosha and Milwaukee, Wisc.; and (2) malt beverages, between Milwaukee, Wisc., on the one hand, and, on the other, Detroit, Mich.

The application was referred to the Administrative Law Judge for hearing and the issuance of an initial decision thereon. A hearing was held at Chicago, Ill., on November 14 and 15, 1973, at which Associated Truck Lines, Inc., Central Transport, Inc., Michigan Express, Inc., Express Freight, Inc., Great Lakes Express Company, Interstate Motor Freight System, Key Line Freight, Inc., Blue Arrow-Douglas, Inc., R-W Service System, Inc., Liberty Trucking Co., Gateway Transportation Co., Inc., Murphy Motor Freight Lines, Inc., and Courier-Newsom Express, Inc. appeared in opposition to part 2 of the application. Only Murphy, Central, Michigan Express, Liberty and Express Freight Line opposed part 1 of the application.

The applicant is a company owned and operated by two black businessmen, each of whom holds half of the outstanding capital stock of the company with a book value of $1,000.

Since September 1, 1973, O-J has operated under temporary authority transporting malt beverages from Milwaukee, Wisc. to Detroit, Mich. This traffic has been destined to Sky-Pac Enterprises of Detroit.

O-J owns and operates one tractor and one van-type, insulated trailer. It presently employs 1 full-time and 1 part-time driver.

A balance sheet as of September 30, 1973, shows total assets of $21,225.08, including current assets of $12,763.73. Its retained earnings were $4,733.22 and net worth $5,-733.22. The applicant is being assisted by the Minority Enterprise Small Business Investment Corporation in obtaining future financial assistance, if necessary.

The malt beverage portion of the instant application (Part 2), is supported by Sky-Pac Enterprises, of Detroit. This company is a distributor of Old Milwaukee Beer and Schlitz Malt Liquor in barrels, half-barrels, bottles and cans. Its area of marketing is the so-called "inner-city" of Detroit. Sky-Pac receives 3 to 4 truckloads of malt beverage from Milwaukee each week.

When Sky-Pac entered business in the fall of 1970, it contacted a number of motor carriers requesting service. The only carrier interested was a Wolverine Trucking Company of Detroit. That carrier was used for a time but its service was so unsatisfactory that Sky-Pac supported the applicant for its temporary authority and has used its service with satisfaction ever since.

The automobile parts portion of the instant application (Part 1), is actively supported by American Motors Corporation, of Detroit, and Ford Motor Company, of Dearborn, Mich.

American Motors states it is interested in using the applicant's service from the Detroit area to Kenosha and Milwaukee, Wisc. The origin area of this traffic would include points in Genesee, Macomb, Oakland and Wayne Counties, Mich. It is presently using the service of six of the protesting carriers but is of the opinion that it would be to its benefit to also use the applicant since its small size would simplify communication and cooperation between the two companies.

Ford Motor Company supports the instant application on automobile parts from Macomb and Wayne Counties, Mich. to Chicago, Ill. It also ships auto parts from Chicago to points in Oakland and Wayne Counties, Mich. It is presently using numerous motor carriers, including 7 of the 12 protestants, on this traffic. If the application is granted, it is Ford Motor Company's intention to tender 2 to 3 loads per week, out of an average of 60 loads, to the applicant. Such a small diversion, Ford feels, would not materially affect the other motor carriers. The motor carrier service Ford is now receiving from Detroit to Chicago is, in its opinion, not as good as it might be. In addition to the involved traffic the protesting carriers now being used by Ford also enjoy Ford tonnage to other areas.

Five divisions of General Motors Corporation intervened in support of the applicant. The prepared verified statements of these witnesses, all experienced traffic directors, were undoubtably prepared by the same author. These witnesses were presented, introduced on direct examination and tendered for cross examination by an attorney for General Motors and not by the applicant's counsel. The substance of each of these "canned" statements was that the present motor carrier service is adequate for General Motors' needs but if the instant application is granted, each of these divisions of General Motors "will consider using the services of the applicant".

It would be obvious to any layman, not to mention five experienced traffic directors and their house attorney, that such statements have absolutely no probative value in a public convenience and necessity proceeding. It is not unreasonable to this Judge to conclude that this so-called "intervention in support" was motivated by a tergiversation to avoid refusing the proferred service of a minority

business enterprise motor carrier. By giving the appearance of support while at the same time expressing no need, or firm intention to use, such service, General Motors Corporation would make this Commission the "heavy" and avoid the likelihood of refusing traffic to the applicant in the future.

Collectively, but to varying degrees, the protesting carriers can perform the transportation services sought in the instant application. However, the Ford Motor Company expressed reservations as to the adequacy of the service it is receiving and American Motors that the proposed service is of the type it prefers using. Neither of these large automobile manufactures intends to divert more than a minute portion of its available traffic from the existing carriers in the event the application were granted. As to the traffic on malt beverages, the applicant is already enjoying this tonnage and there would be no diversion involved.

The Administrative Law Judge concludes that the service proposed in this application will serve a useful public purpose, responsive to a public need without endangering or impairing the operations of existing carriers contrary to the public interest. It is further concluded that the record reflects no evidence of service need from or to Janesville, Wisc. Furthermore, since the Commission as determined in Interpretation, *Operating Rights-Returned Containers*, 82 M. C. C. 677, that the return transportation of empty boxes, crates, cases, barrels, drums, and other containers and shipping devices and of dunnage from the destination to the origin of a commodity is interpreted as included in all certificates and permits, the authority on malt beverages in the findings herein will be limited to authority from Milwaukee to Detroit.

FINDINGS AND ORDER

Upon consideration of all the evidence of record, the Administrative Law Judge finds that the public convenience and necessity require the operation by O-J Transport Company, as a motor common carrier in interstate or foreign commerce, over irregular routes, of (1) automobile parts, between points in Genesee, Macomb, Oakland and Wayne Counties, Mich., on the one hand, and, on the other, Chicago, Ill., and Kenosha and Milwaukee, Wisc. and, (2) malt beverages, from Milwaukee, Wisc., to Detroit, Mich.; that the said O-J Transport Company is fit, willing and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder; that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969; that a certificate authorizing such operation should be issued; and that in all other respects the application should be denied.

It is therefore my ORDER, That in the absence of a stay or postponement by the Commission or the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service thereof;

It is further ordered, That upon full compliance with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act, and with the Commission's rules and regulations promulgated thereunder, a certificate be issued to applicant authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of the commodities described and in the manner described herein;

It is further ordered, That the application in all other respects be, and it is hereby denied.

And it is further ordered, That unless compliance is made by applicant with the requirements of sections 215, 217, and 221(c) of the act within 90 days after the date of service of a notice to the parties that this order has become effective as the order of the Commission, or within such additional time as may be authorized by the Commission, the grant of authority shall be considered as null and void, and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

Dated at Washington, D. C., this 7th day of December, 1973.

By the Commission, John S. Messer, Administrative Law Judge.

(Seal)

Robert L. Oswald
Secretary

APPENDIX B

Served December 31, 1974

M-12612

INTERSTATE COMMERCE COMMISSION

No. MC-138676

O-J TRANSPORT COMPANY COMMON CARRIER APPLICATION[1]

Decided November 19, 1974

Public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of malt beverages from Milwaukee, Wis., to Detroit, Mich. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application in all other respects denied.

William B. Elmer and *Robert E. McFarland* for applicant.

Leonard F. Charla for intervener in support of applicant.

John W. Bryant, Rex Eames, Joel H. Steiner, and *Michael J. Wyngaard* for protestants.

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1. Originally entitled O-J Transport Company—Application

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY, GRESHAM, AND O'NEAL

MURPHY, *Commissioner*:

Exceptions to the initial decision and recommended order of the Administrative Law Judge were filed by certain protestants,[2] and applicant replied. Our conclusions differ in part from those recommended.

By application filed April 23, 1973, as amended, O-J Transport Company, of Detroit, Mich., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, (1) of automobile parts, between points in Genesee, Macomb, Oakland, and Wayne Counties, Mich., on the one hand, and, on the other, Chicago, Ill., and Janesville, Kenosha, and Milwaukee, Wis.; and (2) of malt beverages between Milwaukee, Wis., on the one hand, and, on the other, Detroit, Mich. Part (1) of the application is opposed by Associated Truck Lines, Inc., Central Transport, Inc., Michigan Express, Inc., Express Freight, Inc., Great Lakes Express Company, Interstate Motor Freight System, Key Line Freight, Inc., Blue Arrow-Douglas, Inc., R-W Service System, Inc., Liberty Trucking Co., Gateway Transportation Co., Inc., Murphy Motor Freight Lines, Inc., and Courier-Newsom Express, Inc. Only Murphy, Central, Michigan Express, Liberty, and Express Freight oppose part (2) of the application.

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2. Exceptions were filed by Courier-Newsom Express, Inc., jointly by protestants Associated Truck Lines, Inc., Blue Arrow-Douglas, Inc., Central Transport, Inc., Michigan Express, Inc., Express Freight Lines, Inc., Great Lakes Express Co., Interstate Motor Freight System, and R-W Service System, Inc., and jointly by protestants Liberty Trucking Co. and Murphy Motor Freight Lines, Inc.

In his initial decision and recommended order, the Administrative Law Judge recommended that part (1) of the application be granted as requested, except that no service from or to Janesville should be authorized, and that part (2) of the application be granted to the extent of authorizing the movement of malt beverages from Milwaukee to Detroit. On exceptions, protestants generally contend that the shipper evidence offered in support of the application is insufficient to warrant any grant of authority in view of protestants' demonstrated ability to perform the proposed operations. In reply, applicant avers that it offered sufficient grounds to warrant a full grant of authority.

Protestant Courier-Newsom filed a motion to strike portions of applicant's reply to the exceptions, to which applicant replied. We see nothing improper in the matters sought to be stricken, which includes information as to the ownership of applicant and, therefore, the motion to strike will be overruled.

The evidence, the Administrative Law Judge's recommendations, the exceptions, and the reply have been considered. We find the Administrative Law Judge's statement of facts to be correct in all material respects and, as modified and supplemented herein, we adopt that statement as our own. The pertinent facts will be restated to the extent necessary for clarity of discussion.

Facts

Applicant presently holds no permanent authority from this Commission, but under temporary authority has been transporting malt beverages from Milwaukee to Detroit. It operates one tractor and one trailer, and anticipates acquiring additional equipment (four tractors and nine trailers) if the application is granted. Applicant's

two owners have indicated that they intend to seek financing for their operation with the aid of the Small Business Investment Corporation should this application be granted. Applicant's balance sheet as of September 30, 1973, shows total assets of $21,225, including current assets of $12,764 and current liabilities of $13,465.

Sky-Pac Enterprises, Inc., is a distributor of malt beverages in Detroit. Shipper obtains its supply of malt beverages from Milwaukee, receiving between three and four truckloads a week. Malt beverages must be transported in insulated vans, and handled with care to avoid breakage. Shipper has used applicant in the past under temporary authority (34 truckloads, weighing a total of 1.5 million pounds were handled during a 2-month period in 1973) and found the service satisfactory. If the application is denied, shipper will return to the use of private carriage to meet its transportation needs, as it did before applicant received temporary authority. It requires return movements of empty bottles, kegs, and pallets once or twice a month.

American Motors Corporation manufactures automobiles at facilities in Kenosha and Milwaukee, Wis. Shipper purchases raw materials from suppliers located in Genessee, Macomb, Oakland, and Wayne Counties, but consolidates these materials at its terminal in Detroit prior to shipping them to Kenosha and Milwaukee. It uses the services of many of the protestants, as well as private carriage to move the raw materials from the Detroit terminal, and would tender an unstated volume of traffic to applicant upon a grant of this application.

Five divisions of General Motors Corporation offered evidence in support of the application.[3] General Motors

3. General Motors Assembly Division, Fisher Body Division, Chevrolet Motor Division, General Motors Parts Division, and AC Spark Plug Division.

manufactures motor vehicles at various points including Warren, Flint, and Detroit, Mich., and Janesville. Shipper is generally served by rail carriers, but a portion of its traffic moves by motor carrier Shipper has used many of the protestants to meet its motor carrier needs, and their services have been adequate except during unspecified peak periods. Shipper did not list any specific service failures.

Ford Motor Company ships traffic consisting of motor vehicle parts between points in Oakland, Macomb, and Wayne Counties, on the one hand, and, on the other, Chicago. The points at which it has facilities in the three Michigan counties include Melvindale, Dearborn, Detroit, Wixom, Romulus, Wayne, Livonia, Mt. Clemens, Sterling Heights, Utica, and Woodhaven. It currently uses many of the protestants for its transportation needs but states that it would tender applicant between two and three truckloads a week out of the 60 truckloads moving weekly between Chicago and the Michigan points. Shipper states that service from Michigan to Chicago is not as good as desired, because equipment is sometimes not available as needed. It described no specific instances, however, where equipment was unavailable or what carriers were involved. It is the policy of Ford Motor Company to encourage "minority-owned" businesses and this is one of the reasons it is supporting applicant.

Additional testimony was offered by a representative of the Small Business Administration who testified generally concerning the role of the SBA in aiding small businesses, such as applicant.

Specific evidence concerning each protestant's operating authority and abstracts of traffic handled are set forth in the appendix to this report. Generally, protestants are regular-route common carriers of general commodities

with the usual exceptions. All protestants operate equipment suitable for the proposed operation and have performed service as to the movement of automotive parts. None of the protestants opposing part 2 of the application offered any specific evidence concerning their movement of malt beverages, although Murphy Motor Freight states generally that it has transported malt beverages from a point not involved here. Finally, most protestants complain of an imbalance of traffic terminating in the Detroit area and indicate a need for additional traffic outbound from Detroit to balance their operations. None of the protestants is aware of any service complaints as to service performed for any of the automotive manufacturers supporting the application.

Discussion and Conclusions

Under the provisions of section 207 of the Interstate Commerce Act, an applicant for motor common carrier authority has the burden of establishing that the operation it proposes is or will be required by the present or future public convenience and necessity. In considering to what extent this statutory requirement has been met, we must determine whether the new operation will serve a useful purpose, responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest. *Pan-American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936).

Applicant has introduced evidence concerning its ownership by members of a particular ethnic group and seems to contend that such evidence should be the basis, at least in part, for a grant of motor carrier operating authority.

Such evidence cannot play any role in a determination as to whether a grant of authority should be made herein. This agency is required to work within the framework of the Interstate Commerce Act and that statute requires us to consider each matter in the public interest as a whole. It does not provide us with any regulatory authority to favor any one group or individual over another for any such divisive reasons as race, creed, color, sex, or national origin. This agency is not empowered to change the legislative direction given by Congress, and any preferential treatment to a particular group or individual would be arbitrary and capricious in the absence of a legislative mandate. Therefore, in determining whether this application should be granted or denied, we will not give consideration to the race, creed, color, sex, or national origin of any of the parties to this proceeding.

In part (1) of the application, applicant seeks to transport automobile parts between four Michigan counties, on the one hand, and, on the other, Chicago, Janesville, Kenosha, and Milwaukee. Three automobile manufacturers testified in support of such operations. Although American Motors purchases raw materials from suppliers located throughout the four counties, it consolidates such purchases at a warehouse in Detroit. Therefore, its transportation need is only from Detroit to its facilities at Kenosha and Milwaukee. It has used many of the protestants to perform this service and has failed to set forth any reason why such service is not adequate. Similarly, General Motors has used the services of many of the protestants in the past, and although it avers in a general way that such service is unsatisfactory at peak periods, it gives no specific instances of service failures by protestants. Finally, Ford has used protestants' services, and represents that such services were less responsive to its need than they should be. Ford likewise, however, has not set

forth any evidence of specific service failures. Protestants collectively hold appropriate authority to fully meet shippers' transportation needs as set forth in the evidence offered to support part (1) of the application. They operate numerous units of equipment suitable for the movement of automobile parts, have extensively and apparently successfully served shippers in the past, and appear to be totally capable of meeting such needs in the future. Part (1) will, therefore, be denied.

In part (2) of the application, applicant seeks authority to transport malt beverages between Milwaukee and Detroit. The pertinent supporting shipper, Sky-Pac, requires insulated vans for the movement of its malt beverages. Although several protestants operate such equipment, none has adequately set forth how they would make such equipment available to shipper. As protestants operate over a large system of regular and irregular routes, yet operate a relatively small number of insulated vans, it is incumbent upon them specifically to describe just how they would provide shipper with the type of service it requires. Furthermore, inasmuch as protestants have not served shipper, while applicant has served Sky-Pac extensively under temporary authority and is familiar with shipper's transportation needs, we believe the benefit to Sky-Pac from the authorization of the proposed service far outweighs any possible detriment to protestants from the loss of this potential traffic. This is especially true in view of protestants' imbalance of traffic terminating in the Detroit area. We agree with the finding of the Administrative Law Judge that the evidence offered by supporting shipper, Sky-Pac, demonstrates a need only for the movement of malt beverages from Milwaukee to Detroit, with occasional return movements of empty bottles and pallets. No specific authority is required for the return transportation of empty containers and pallets used

in transporting the basic commodity. See *Fox-Smythe Transp. Co. Extension—Oklahoma*, 106 M.C.C. 1 (1967).

FINDINGS

We find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of malt beverages from Milwaukee, Wis., to Detroit, Mich.; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder; that an appropriate certificate should be issued; that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969; and that the application in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the act and with the Commission's rules and regulations thereunder, within the time specified in the order entered concurrently herein, an appropriate certificate will be issued. An appropriate order will be entered.

COMMISSIONER O'NEAL, dissenting in part:

I would affirm in its entirety the decisions of the Administrative Law Judge. The evidence is sufficient to support his finding of a need for the proposed service.

The report contains the following language:

> Applicant has introduced evidence concerning its ownership by members of a particular ethnic group and seems to contend that such evidence should be the basis, at least in part, for a grant of motor carrier

operating authority. Such evidence cannot play any role in a determination as to whether a grant of authority should be made herein. This agency is required to work within the framework of the Interstate Commerce Act and that statute requires us to consider each matter in the public interest as a whole. *It does not provide us with any regulatory authority to favor any one group or individual over another for any such divisive reasons as race, creed, color, sex, or national origin.* This agency is not empowered to change the legislative direction given by Congress, and any preferential treatment to a particular group or individual would be arbitrary and capricious in the absence of a legislative mandate. Therefore, in determining whether this application should be granted or denied, we will not give consideration to the race, creed, color, sex, or national origin of any of the parties to this proceeding. [Emphasis added.]

I agree that the issue of minority group status should have no bearing on the present case. However, the language used in the report is extremely broad and seems to rule out *any* consideration of ethnic factors. Ethnic factors have been given consideration by the Commission in granting passenger and freight authorities. See, *e.g.*, grant of common or contract carrier passenger authority where the part of the public to use such service was an ethnic group requiring special services (usually knowledge of Spanish language) by the applicant—*Bracero Transp. Co., Inc.—Migrant Workers*, 78 M.C.C. 461 (1958); *Illing Contract Carrier Application*, 52 M.C.C. 79 (1950); also, grant of contract carrier freight authority where the applicants could provide Italian language service to deal with shippers' ethnic group customers—*Matura Trucking Corp. Contract Carrier Application*, 68 M.C.C. 766 (1956).

The contention that such factors cannot be relevant to deciding an application for authority, and that any consideration of them is improper, was rejected in *National Bus Traffic Association* v. *United States,* 284 F.Supp. 270 (N.D. Ill. 1967), affirmed *per curiam,* 391 U.S. 408 (1968). The Commission has properly drawn the line between when such factors may properly be considered, and when it would be improper to do so, in holding that it must recognize:

> * * * the essential difference between a grant of authority based on ethnic, racial, or language considerations as contrasted to a grant of authority serving the demonstrated needs of a particular class of users. Clearly, we are required under the national transportation policy to provide fair and impartial regulation and to promote safe, adequate, economical, and efficient transportation services (49 U.S.C. preceding section 1). A grant of authority predicated on ethnic, racial, or language considerations is improper.
>
> Consistent with our statutory responsibilities, some grants of authority are made either where a need has been shown to serve a particular class of users of a proposed service or where it has been shown that a distinctive kind of service would fulfill a demonstrated need. That is to say, if existing services are not providing an adequate service to any segments of the public, a grant of authority to an applicant to cure this defect does not evince a discriminatory grant but is, instead, a grant to provide a needed service.

Elegante Tours, Inc.—Broker Application, 113 M.C.C. 156, 160 (1971).

The language in the instant report, in my opinion, is overly broad and does not reflect the case law which has developed around this issue.

Appendix

Associated Truck Lines, Inc., holds appropriate authority to serve all of the facilities of Ford and General Motors (except at Mt. Clemens) as set forth in shippers' testimony on traffic moving to Chicago. It has transported directly or by interline service a total of 585 shipments of automobile parts, weighing a total of 1.4 million pounds between October 15 and October 19, 1973, including service for General Motors and Ford.

Central Transport, Inc., and Michigan Express, Inc., jointly hold authority, as pertinent, to serve all the points at which American Motors, Ford, and General Motors operate facilities (except Janesville) as set forth in shippers' evidence and also authority for malt beverages from Milwaukee to Detroit. They have handled no malt beverages from Milwaukee. During the week of October 28 through November 3, 1973, however, they transported 119 shipments of automobile parts, weighing a total of 943,616 pounds, including movements on behalf of all three automobile manufacturers supporting the application.

Express Freight, Inc., holds appropriate authority between Detroit, Kenosha, and Milwaukee. Such authority enables it to serve all the Ford facilities, except Mt. Clemens, Woodhaven, Wixom, and one of the two facilities at Sterling Heights. It moved 495 shipments of auto parts, weighing a total of 4.7 million pounds to the American Motors facilities at Milwaukee and 710 shipments, weighing a total of 10 million pounds to the American Motors facilities at Kenosha during October 1973.

Great Lakes Express Company holds authority, as pertinent, to serve all the Ford and General Motors facilities listed in Michigan on traffic moving to Chicago. It trans-

ported 10 shipments for Ford, weighing a total of 287,266 pounds from Sterling Heights to Chicago during June 1973.

Interstate Motor Freight System holds authority, as pertinent, between Milwaukee, Kenosha, Janesville, Chicago, and all the facilities set forth by the three automobile manufacturers. It moved 51 shipments of auto parts weighing a total of 1.4 million pounds between the involved points in Michigan and points in Wisconsin, between June 22 and October 30, 1973, and 36 shipments weighing a total of 206,535 pounds between October 1 and November 12, 1973, from Michigan points to Chicago.

Blue Arrow-Douglas, Inc., holds authority, as pertinent, between Flint, Troy, and Pontiac, Mich., and Chicago. By interlining with protestant Liberty it can also serve Janesville. It has transported 304 shipments of automotive parts and containers weighing a total of 1.7 million pounds between June 18 and June 30, 1973, directly or by interlining between points involved herein.

Liberty Trucking Co. does not hold authority to serve Michigan, but does hold authority to serve Kenosha and Janesville and interlines with protestants Murphy and Blue Arrow at a point in Illinois on traffic originating at or destined to points in Michigan. It offered an abstract of representative traffic involving automotive parts transported between May 30 and August 3, 1973, which shows 26 shipments weighing a total of approximately 220,000 pounds, moving to and from Janesville.

R-W Service System, Inc., holds authority, as pertinent, between Chicago and all Ford facilities (except Mt. Clemens and Woodhaven) and all General Motors facilities. It transported 1.7 million pounds of automotive parts from or to points in Michigan during October 1973.

Murphy Motor Freight Lines, Inc., holds authority, as pertinent, to serve Chicago, Janesville, Kenosha, Milwaukee, and Detroit. It transported 178 movements of automobile parts and return shipments weighing a total of 2.7 million pounds between September 17 and September 22, 1973, between points in Michigan and Chicago, Kenosha, and Milwaukee.

Courier-Newsom Express, Inc., holds authority, as pertinent, to serve all Ford facilities, except Mt. Clemens, and all General Motors facilities, on traffic moving to Chicago. It transported 37 shipments of automotive parts and lubricants, weighing a total of 321,386 pounds between points in Macomb, Oakland, and Wayne Counties, on the one hand, and, on the other, Chicago during September 1973.

Gateway Transportation Co., Inc., holds authority, as pertinent, to serve all the Michigan facilities of automotive manufacturers supporting the application, except the facility at Mt. Clemens, on traffic moving to Janesville, Milwaukee, Kenosha, and Chicago. It did not offer an abstract of the involved traffic it has handled.

Key Line Freight, Inc., did not offer any evidence in opposition to the application.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D.C., on the 19th day of November 1974.

No. MC-138676

O-J TRANSPORT COMPANY COMMON CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That the motion to strike filed by Courier-Newsom, Inc. protestant, be, and it is hereby, overruled.

It is further ordered, That the application, except to the extent granted herein, be, and it is hereby, denied.

And it is further ordered, That unless compliance is made by applicant with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority made in said report shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, division 1.

Robert L. Oswald
Secretary

(Seal)

APPENDIX C

ORDER

(Service Date April 30, 1975)

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, Acting as an Appellate Division, held at its office in Washington, D.C., on the 28th day of April, 1975.

No. MC-138676

O-J TRANSPORT COMPANY COMMON CARRIER APPLICATION

(Detroit, Mich.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of applicant, filed January 31, 1975, for reconsideration;

(2) Reply by Courier-Newsom Express, Inc., protestant, filed February 14, 1975;

(3) Joint reply by Liberty Trucking Co., and Murphy Motor Freight Lines, Inc., protestants, filed February 19, 1975;

(4) Joint reply by Associated Truck Lines, Inc., Blue Arrow-Douglas, Inc., Central Transport, Inc., Michigan Express, Inc., Express Freight Lines, Inc., Great Lakes Express Company, Interstate Motor Freight System, and R-W Service System, Inc., protestants, filed March 10, 1975;

and good cause appearing therefor:

It is ordered, That the petition be, and it is hereby, denied for the reason that the findings of Division 1, in its report and order of November 19, 1974, reported at 120 M.C.C. 699, are in accordance with the evidence and the applicable law.

It is further ordered, That unless compliance is made by applicant with the requirements of Sections 215, 217, and 221(c) of the Interstate Commerce Act, within 90 days after the date of service of this order, or within such additional time as may be authorized by the Commission, the grant of authority shall be considered as null and void, and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, Division 1, Acting as an Appellate Division.

Robert L. Oswald
Secretary

(Seal)

APPENDIX D

No. 75-1671

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O-J Transport Company,
Petitioner,

v.

United States of America and Interstate Commerce Commission,
Respondents,

and

Associated Truck Lines, Inc., Blue Arrow-Douglas, Inc., Central Transport, Inc., Michigan Express, Inc., Express Freight Lines, Inc., Great Lakes Express Company, Interstate Motor Freight System, R-W Service System, Inc., and Courier-Newsom Express, Inc.,
Intervenors.

PETITION for Review from the Interstate Commerce Commission.

Decided and Filed June 4, 1976.

Before: PECK, MILLER* and LIVELY, Circuit Judges.

LIVELY, Circuit Judge. This is a petition for review of a final order of the Interstate Commerce Commission

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*The Honorable William E. Miller died on April 12, 1976 and did not participate in this opinion.

(Commission) denying the application of petitioner O-J Transport Company (O-J) for a certificate of convenience and necessity under § 207(a) of the Interstate Commerce Act, 49 U.S.C. § 307(a). O-J is a small trucking company owned by two black residents of Detroit, Michigan. It has been engaged in hauling malt beverages from Milwaukee, Wisconsin to Detroit under temporary authority since September 1, 1973. Its application sought a certificate of public convenience and necessity authorizing transportation of automobile parts over irregular routes between designated points in the Detroit, Michigan area on the one hand and Chicago, Illinois and Janesville, Kenosha and Milwaukee, Wisconsin on the other, as well as the transportation of malt beverages between Milwaukee and Detroit. The Commission directed that a certificate issue for the transportation of malt beverages, but denied the application for authority to transport automobile parts. *See O-J Transport Company Common Carrier Application*, 120 M.C.C. 699 (1974). That portion of the order which granted the certificate for transportation of malt beverages is not before this court and our review is concerned only with the denial of O-J's application for authority to haul automobile parts.

O-J's application was supported by the "big three" automobile manufacturers, General Motors, Ford and American Motors, and was opposed by a large number of trucking companies which hold certificates that permit, *inter alia*, the transportation of automobile parts between the points designated in the application. The protesting carriers have transported automobile parts for one or more of the automobile manufacturers who supported the application. The administrative law judge to whom the application was referred for hearing and initial decision found that the protesting carriers could perform services for which O-J sought a certificate, but that Ford Motor Company

had "expressed reservations as to the adequacy of the service it is receiving and American Motors that the proposed service is of the type it prefers using." He discounted the supporting documents of General Motors as being too indefinite to have probative value in a public convenience and necessity proceeding. Finding further that neither Ford nor American Motors intended to divert more than a small fraction of its available traffic from existing carriers if O-J's application were granted, the administrative law judge concluded (with exception of the request for service from or to Janesville, Wisconsin) that "the service proposed in this application will serve a useful public purpose, responsive to a public need without endangering or impairing the operation of existing carriers contrary to the public interest." He then made the specific finding that public convenience and necessity required the operation by O-J as a motor common carrier in the manner set forth in the application (excluding service to and from Janesville, Wisconsin) and that O-J was able properly to perform such services. The protesting carriers filed exceptions and, upon review, the Commission denied the auto parts application by a two-to-one vote, Commissioner O'Neal dissenting.

In these review proceedings O-J first contends that the Commission abused its discretion by denying O-J's application on the sole basis of a finding that the existing carriers are capable of providing the service sought to be rendered in the application while ignoring other criteria, and that its findings are not supported by substantial evidence in the record. In *Interstate Commerce Commission v. J-T Transport Co., Inc.*, 368 U.S. 81, 88 (1961), a contract carrier case, the Supreme Court held that the Commission must consider the adequacy of existing services, but that this factor is "not determinative." This principle has also been applied in common carrier cases. *See e.g., Warren*

Transport, Inc. v. *United States,* 525 F.2d 148, 149 (8th Cir. 1975), quoting from *Feature Film Service, Inc.* v. *United States,* 349 F.Supp. 191, 201 (S.D. Ind. 1972), as follows:

> The adequacy or inadequacy of existing service is a basic ingredient in the determination of public convenience and necessity, but it is not and may not be used as the sole test in determining whether public convenience and necessity exist . . . . Successful past operations of the applicant, along with other factors, are also entitled to consideration in determining public need.

A careful reading of the Report of the Commission does not lead to the conclusion that the majority relied solely on the finding that existing service is adequate in denying O-J's application. The Commission pointed out that the applicant has the burden of establishing that its proposed operation is or will be required by present or future public convenience and necessity and then paraphrased often-quoted Commission language from *Pan-American Bus Lines Operation,* 1 M.C.C. 190, 203 (1936), as follows:

> In considering to what extent this statutory requirement has been met, we must determine whether the new operation will serve a useful purpose, responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest. 120 M.C.C. at 702.

In addition to adequacy of existing service and facilities the Commission considered the very general nature of the statements of the supporting shippers intended to

establish public convenience and necessity and the evidence of the protesting carriers "of an imbalance of traffic terminating in the Detroit area and . . . a need for additional traffic outbound from Detroit to balance their operations."

In *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 65 (1945), the Supreme Court pointed out that the role of the Commission is to find the facts and make determinations of whether public convenience and necessity require additional motor carrier service in a particular situation where an application has been made. In exercising this discretionary function the Commission may rely on a wide variety of circumstances which its expertise indicates are relevant to a particular determination. In reviewing a determination by the Commission of the existence or non-existence of public convenience and necessity in a given case the courts must examine the Commission's evaluation of the record to determine that the Commission has exercised its discretion "in conformity with the declared policies of the Congress" as set forth in the statement of National Transportation Policy, 49 U.S.C. preceding § 1. *Shaffer Transportation Co.* v. *United States,* 355 U.S. 83, 87-88 (1957). We believe the Commission's holding in this case was based on substantial evidence related to factors required to be considered under existing transportation policies.

Though the Commission's finding that public convenience and necessity do not require the granting of O-J's application is supported by substantial evidence, this does not end the court's inquiry. As the Supreme Court stated in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 284 (1974), it is possible for a finding to be supported by substantial evidence and yet reflect arbitrary and capricious action. There the Court pointed out that the Administrative Procedure Act (APA)

in 5 U.S.C. § 706 provides six separate standards of review. These standards are stated in the disjunctive and an agency's action, findings and conclusions may satisfy one of these criteria and not another. However, when the substantial evidence test has been met the scope of review is quite narrow and the court must avoid substituting its judgment for that of the Commission. The APA does not require an agency to furnish detailed reasons for its decision so long as its conclusions and underlying reasons may be discerned with confidence. *Lemmon Transport Co., Inc.* v. *United States,* 393 F.Supp. 838, 841 (W.D. Va. 1975). Stated another way, the Commission's decision must be sufficiently clear so that a court is not required to speculate as to its basis. *Ross Express, Inc.* v. *United States,* 529 F.2d 679, 682 (1st Cir. 1976).

In *Bowman, supra,* the Court also noted that the Commission is not bound by the findings of its examiner (administrative law judge), 419 U.S. at 288 n.4. Nevertheless the agency "must articulate a 'rational connection between the facts found and the choice made,'" quoting from *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168 (1962). *Id.* at 285. Finally, in summarizing the scope of judicial review the Court stated: "While we may not supply a reasoned basis for the agency's action that the agency itself has not given, . . . we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* at 285-86. (citations omitted). In the present case the Commission considered the volume of traffic in auto parts being carried by the protesting truckers, the diversion of volume from these truckers if the application were granted and the existing imbalance of shipments between Detroit and Chicago. We discern in the Commission's findings a weighing of competing interests and a determination that the adverse effect upon existing carriers of granting the application would outweigh any benefit to the public disclosed by the applicant's evidence. As the Court stated in *Bowman, supra,* this is precisely the type of judgment which the Commission is required to exercise. *Id.* at 293.

The second allegation by O-J of arbitrary and capricious action on the part of the Commission is not so readily disposed of by reference to traditional concepts of the respective roles of administrative agencies and reviewing courts. One of the bases of support of the application by Ford Motor Company was Ford's "strong commitment to assist and support in whatever way possible the establishment and growth of minority-owned businesses in the United States, and in the Detroit metropolitan area, specifically. In denying the application of O-J the Commission wrote—

> Applicant has introduced evidence concerning its ownership by members of a particular ethnic group and seems to contend that such evidence should be the basis, at least in part, for a grant of motor carrier operating authority. Such evidence cannot play any role in a determination as to whether a grant of authority should be made herein. This agency is required to work within the framework of the Interstate Commerce Act and that statute requires us to consider each matter in the public interest as a whole. It does not provide us with any regulatory authority to favor any one group or individual over another for any such divisive reasons as race, creed, color, sex, or national origin. This agency is not empowered to change the legislative direction given by Congress, and any preferential treatment to a particular group or individual would be arbitrary and capricious in the absence of a legislative mandate. Therefore, in determining whether this application should be

granted or denied, we will not give consideration to the race, creed, color, sex, or national origin of any of the parties to this proceeding.

120 M.C.C. at 703.

The essence of O-J's argument is that the Commission was required to consider the fact that it is owned by members of a minority race in determining whether public convenience and necessity required the application to be granted. In its brief O-J quotes from a number of opinions and treatises dealing with the meaning of "public convenience and necessity." While noting that public convenience and necessity is not defined in the statutes which establish it as a standard, these authorities agree that the word "necessity" as used in the phrase does not mean absolutely necessary or indispensable. Those actions within the sphere of regulated activity which are found to meet a public demand may be regarded as satisfying the necessity portion of the public convenience and necessity standard. O-J then argues that the public interest would be served by facilitating the entry of minority-owned trucking firms into a commercial activity such as that of transporting automobile parts. In support of this position O-J again cites numerous opinions of courts and the Interstate Commerce Commission holding that factors other than adequacy of existing carrier service must be considered in determining public convenience and necessity. *E.g., Nashua Motor Express, Inc.* v. *United States*, 230 F.Supp. 646 (D.N.H. 1964); *Frozen Foods Express, Inc.* v. *United States*, 346 F.Supp. 254 (W.D. Tex. 1972); *Pan-American Bus Lines Operation*, 1 M.C.C. 190 (1936); *Onley Refrigerated Transportation, Inc.—Food Stuffs and Drugs*, 118 M.C.C. 715 (1973).

A careful examination of the authorities cited by O-J reveals that the other factors referred to in these opin-

ions relate directly to transportation services. In *New York Central Securities Corporation* v. *United States*, 287 U.S. 12 (1932), the Supreme Court was concerned with the provision of the Interstate Commerce Act, § 5(2), which permits the Commission to approve the acquisition of control by one carrier of another upon finding that it will be "in the public interest." The Court held that the criterion of "public interest" is not "a mere general reference to public welfare without any standard to guide determinations." *Id.* at 24. The Interstate Commerce Act and the Transportation Act were held to specify the considerations which make up the public interest as this criterion is applied by the Commission. These considerations all have reference to the transportation needs of the public as opposed to its general needs. This principle was recently reaffirmed by the Supreme Court in *National Association for the Advancement of Colored People* v. *Federal Power Commission*, 44 U.S.L.W. 4659 (U.S. May 19, 1976) (Nos. 74-1608, 1619). Similar language is found in *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79 (1944), where the Court held that the fact that Congress "has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies . . ." does not "necessarily include either the duty or the authority to execute numerous other laws." The Court pointed out that the task of the Interstate Commerce Commission is to enforce certain legislation dealing specifically with transportation facilities, services and problems and that the policies expressed in such legislation "must be the basic determinants of its action." *Id.* at 80. Nevertheless, the Court cautioned that the Commission could not ignore governmental policies reflected in other legislation enacted to deal with different problems.

The Interstate Commerce Commission is primarily concerned with insuring that the public has available for its use adequate systems of transportation which are safe, adequate, economical and efficient. Congress has delegated broad discretionary powers to the Commission in making determinations of public convenience and necessity. When considerations other than those strictly concerned with transportation are found nevertheless to affect the transportation-related convenience and needs of the public they may be considered by the Commission. *National Bus Traffic Association, Inc.* v. *United States*, 284 F. Supp. 270 (N.D. Ill. 1967), *aff'd per curiam*, 391 U.S. 468 (1968). This position was clearly stated by the Commission in *Elegante Tours, Inc.—Broker Application*, 113 M.C.C. 156, 160 (1971), where it wrote:

> What the examiner's report in this proceeding failed to recognize is the essential difference between a grant of authority based on ethnic, racial, or language considerations as contrasted to a grant of authority serving the demonstrated needs of a particular class of users. Clearly, we are required under the national transportation policy to provide fair and impartial regulation and to promote safe, adequate, economical, and efficient transportation services (49 U.S.C. preceding section 1). A grant of authority predicated on ethnic, racial, or language considerations is improper.
>
> Consistent with our statutory responsibilities, some grants of authority are made either where a need has been shown to serve a particular class of users of a proposed service or where it has been shown that a distinctive kind of service would fulfill a demonstrated need. That is to say, if existing services are not providing an adequate service to any segments of the public, a grant of authority to an applicant to cure this defect does not evince a discriminatory grant but is, instead, a grant to provide a needed service.

There was no showing in the present case that the transportation needs of the public as opposed to the general public welfare would be served by the entry of minority-owned carriers into the business of hauling automobile parts between the locations set out in O-J's application.

As the Court of Appeals for the District of Columbia noted in *National Association for the Advancement of Colored People* v. *Federal Power Commission*, 520 F.2d 432 (1975), which decision has been affirmed by the Supreme Court, 44 U.S.L.W. 4659 (U.S. May 19, 1976) (Nos. 74-1608, 1619), Congress has dealt with the plight of minorities in this country in many legislative acts without assigning responsibility for this problem to existing regulatory agencies. The court reasoned that—

> . . . Congress may have felt that other significant goals would be inadequately served if the attentions of the agencies set up to pursue them were divided. The Commission's [(FPC)] principal task of passing on statutorily specified license and rate applications is prodigious. To perform it, a staff has been built up of specialists in the technical aspects of gas and electric power production and distribution. The unfamiliar problem of employment discrimination regulation might divert an inordinate amount of their energies and skill from the ends to which these are most productively applied. *Id.* at 436. (footnote omitted).

The same observations might accurately be made about the Interstate Commerce Commission. The task of enforcing the transportation policies of the nation is an enormous one. The skills of the Commission's staff are not

those required to implement an affirmative action program designed to enlarge the opportunities of minority-owned and operated businesses. The public interest which Congress intended the Interstate Commerce Commission to promote and protect is one related to transportation, not the more general public interest in the sense of the general welfare. While we agree with the dissenting member O'Neal that the language of the majority in the Report of the Commission is too broad if read to mean that evidence of ownership by a particular ethnic group can never play a role in the determination of whether to grant authority, we find it was not a proper consideration in the present case because it was totally unrelated to the transportation needs of the public.

This court is aware of the problems which minority-owned businesses encounter in getting established. This is particularly true in the field of motor transportation where a "grandfather clause" ensured the certification of existing carriers at a time when black business ownership was rare. Nevertheless, Congress has not chosen to require the Commission to consider minority ownership as a separate factor in determining public convenience and necessity and it is beyond our authority to impose such a requirement.

The petition for review is denied.

APPENDIX E

49 USC §306 (a)

Sec. 206. [U. S. Code, Title 49, sec. 306.] (a) (1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided, however, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935 under any code of fair competition requiring registration, the fact of registration shall be evidence

of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful.

49 USC §307 (a)

Sec. 207. [U. S. Code, Title 49, sec. 307.] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: Provided, however, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

49 USC preceding §301

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote, safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-317

O-J TRANSPORT COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents,

and

ASSOCIATED TRUCK LINES, INC., BLUE ARROW-DOUGLAS, INC., CENTRAL TRANSPORT, INC., MICHIGAN EXPRESS, INC., EXPRESS FREIGHT LINES, INC., GREAT LAKES EXPRESS COMPANY, INTERSTATE MOTOR FREIGHT SYSTEM, R-W SERVICE SYSTEM, INC. and COURIER-NEWSOM EXPRESS, INC.,
Intervenors and Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENTS ASSOCIATED TRUCK LINES, INC., BLUE ARROW-DOUGLAS, INC., CENTRAL TRANSPORT, INC., MICHIGAN EXPRESS, INC., EXPRESS FREIGHT LINES, INC., GREAT LAKES EXPRESS COMPANY, INTERSTATE MOTOR FREIGHT SYSTEM AND R-W SERVICE SYSTEM, INC.

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Intervenors and Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 24 of the Rules of this Court, respondents and intervenors Associated Truck Lines, Inc., Blue Arrow-Douglas, Inc., Central Transport, Inc.,

Michigan Express, Inc., Express Freight Lines, Inc., Great Lakes Express Company, Interstate Motor Freight System and R-W Service System, Inc., hereby submit their Brief in opposition to the Petition for Writ of Certiorari in this matter, following the decision of the United States Court of Appeals for the Sixth Circuit in *O-J Transport Co.* v *U.S.*, 536 F. 2d 126 (6th Cir., 1976) (A25).*

ARGUMENT

By its Petition for Certiorari, petitioner, O-J Transport Company, asks this Court to consider an issue which has been completely resolved by this Court in its very last term. The question which O-J presents to the Court is that of the obligation of a Federal regulatory agency to give determinative weight to racial or ethnic factors which are unrelated to the agency's statutory functions. Specifically, the issue presented by the O-J Petition is whether the Interstate Commerce Commission was required to afford determinative weight to the minority status of O-J's owners in determining whether to grant O-J's application for motor common carrier authority. In *NAACP* v *Federal Power Commission*, _____ U.S. _____, 96 S. Ct. 1806, 48 L. Ed. 2d 284 (decided May 19, 1976), this Court conclusively resolved this issue, analogizing the obligations of the Federal Power Commission to those set forth in several cases arising under the Interstate Commerce Act. Yet, less than four months later, petitioner is asking this Court to issue yet another decision on this subject, involving the very same statutes which it discussed in deciding the *NAACP* case.

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*Citations to the decisions in the appendix to the Petition are given as (A ___).

Respondents maintain that the decision of the Sixth Circuit below is completely in accord with the principles of *NAACP* and that there is no basis for granting the Petition for Certiorari by O-J.

In the *NAACP* case, the issue before the Court was to what extent Congress had granted the Federal Power Commission authority to combat discriminatory employment practices by the companies it regulates. (48 L. Ed. 2d at 289) The Court was presented with two statutory bases to justify a conclusion that the Commission could or must concern itself with such practices. Initially, it was argued that the Commission had the power to exclude costs from such practices from its consideration of the reasonableness of rates of regulated companies. Exclusion of unnecessary costs had long been provided for under the Federal Power Act and the Natural Gas Act, and the Court accordingly confirmed the Commission's power to apply its statutory functions to costs arising from employment discrimination. However, in Part B of the *NAACP* opinion, the Court has refused to conclude that the Commission must otherwise concern itself with discriminatory practices merely because the term "public interest" appears at various points in the Power and Gas Acts. Rather, the Court in *NAACP* has held that the Federal Power Commission was authorized to consider discrimination only insofar as such discrimination was related to its statutory goal of promoting the orderly production of electric energy and natural gas at just and reasonable rates. It has specifically refused to approve attacks on discrimination by the Commission which were unrelated to the Commission's specifically defined regulatory functions. In short, where no connection is

shown to exist between employment discrimination and the production of gas or electricity at reasonable rates, the Commission has no authority to take action regarding such discrimination. Thus, the *NAACP* decision clearly limits agency consideration of racial factors to those situations where such factors are shown to have a direct connection to the agency's stated regulatory functions.

The relief sought by O-J is exactly that which was rejected by this Court in Part B of *NAACP*, namely a request that determinative weight be attached to O-J's minority ownership in an application proceeding before the Interstate Commerce Commission, even though no connection had been demonstrated between such ownership and the transportation service to be provided to the shipping public. Like the petitioners in *NAACP*, O-J argued extensively before the Court of Appeals that the term "public convenience and necessity" appearing in the Interstate Commerce Act was sufficiently broad to encompass the goal of promoting minority entrepreneurship. (*O-J Transport Co.* v *U.S.*, 536 F. 2d at 131) (A32) No attempt was ever made to show that the fact that O-J's owners are black would in any way enhance the nature of the transportation service proposed by O-J. Further, none of the supporting shippers stated that minority ownership would have any bearing on the type of motor carrier service they expected to receive. (*O-J Transport Co.* v *U.S.*, 536 F. 2d at 131, 132) (A32, A35, A36) The Court of Appeals recognized the long line of decisions under which the Commission has stated that it will give consideration to racial factors when properly related to transportation circumstances. (536 F. 2d at 131-132) (A34) The logic of these cases is similar to that applied to the Federal Power Commission in Part A of *NAACP*. However, the Court noted that whereas these cases described the manner in which minority ownership

had to be related to transportation needs of the public, the contention that minority ownership in and of itself must be promoted by the Commission was a matter relating only to the general public welfare. (536 F. 2d at 132) (A35, A36) As the evidence in O-J had not related O-J's minority ownership to transportation needs, the Court of Appeals found that such ownership was not a proper consideration for decision by the Commission. (536 F. 2d at 132) (A36) This is in complete accord with the reasoning of this Court in *NAACP*, and, in fact, the Court of Appeals specifically cited *NAACP* as a basis for its decision.

There is no merit to any of the arguments advanced by O-J to suggest that the standards set forth in *NAACP* are somehow inapplicable to the *O-J* case. Initially, O-J has attempted to draw a distinction between actions of federal agencies depending on whether the agency is evaluating the conduct of existing licensees or rather, evaluating whether additional persons should become licensees. (See Petition for Certiorari, p. 12, 13) This is a meaningless distinction. In imposing conditions on existing licenses and in granting new licenses, an administrative agency operates pursuant to a common body of statutory authority. There is no merit to any suggestion that an agency could go beyond its specific statutory functions in granting new licenses, even though it is required to stay within these functions in governing the conduct of those who already hold such licenses. The holding of this Court in *NAACP* is clearly that agency actions must be in furtherance of the specific statutory purposes set forth by Congress, rather than pursuing actions which merely promote the general public welfare.

This standard applies equally regardless of whether the agency is considering the need for the granting of a new license or acting to set conditions on the service performed under an existing license.

Similarly, there is no merit to O-J's attempt to characterize the decisions of the Commission and the Sixth Circuit as holding that minority status could never be considered in an application for motor carrier authority. Intitially, it is clear that the Commission's report in *O-J* does not take this position. In its report, the Commission initially held that as a threshold matter, applicant's minority ownership could have had some bearing on the application proceeding. One of the protestant motor carriers, Courier-Newsom Express, Inc., had moved to strike portions of a pleading filed by O-J pertaining to its minority ownership, for the reason that such ownership could not be considered by the Commission and was, therefore, immaterial. The Commission rejected this motion to strike, finding that matters relating to the ownership of the applicant were properly included within the record. (*O-J Transport Company Com. Car. App.*, 120 M.C.C. 699, at 700) (A8, A10) Moreover, the language in the majority report discussing whether O-J's black ownership should be considered indicates at numerous points that it relates specifically to "this application" and to "such evidence" as was presented by O-J. The Commission treated O-J's request for consideration of its minority status as a request for preferential treatment, or favoritism, rather than as a request based on any evidentiary justification relevant to the Interstate Commerce Act. In his dissenting opinion, Commissioner O'Neal questioned whether the language of the majority opinion suggested an overruling of the Commission's long line of cases giving effect to minority ownership in certain situations. (120 M.C.C. at 705) (A17) However, the majority made

no indication that it intended to overrule or modify this prior decisional law.[1] Thus, contrary to O-J's assertion at page 14 of its Petition, the Commission's decision did not hold that in all cases the ownership of an applicant could not play a role as to whether a grant of authority should issue. Rather, the Commission's determination was that an applicant such as O-J which had shown no connection between its minority ownership and the ultimate transportation service to be provided to the public should not receive any special consideration because of the mere fact of minority ownership standing alone.

Not only has O-J mischaracterized the decision of the Commission, but it also has charged the Court of Appeals with adopting this same view that minority ownership could never be considered by the Commission. In point of fact, the Court of Appeals opinion specifically recognized that the Commission can and does take account of minority factors in evaluating applications for authority when such factors are "found . . . to affect the transportation-related convenience and needs of the public". (*O-J Transport Co.* v *U.S.*, 536 F. 2d at 132) (A34) Indeed, the Court of Appeals quoted extensively from the Commission decision in *Elegante Tours, Inc. - Broker Application*, 113 M.C.C. 156, 160 (1971), in which the Commission extensively analyzed how minority status related to issues of public convenience and necessity. The Court of Appeals in no way stated that it is impermissible for a Federal agency to deal with the plight of minorities in this country, as alleged at page 22 of the O-J Petition. To the extent that the transportation needs of minorities in this country are not being met, the

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[1]For an example of a Commission decision overruling a line of authority, see *Adams Egg Farms, Inc., Contract Carrier Application*, 95 M.C.C. 282 (1964).

Commission is empowered to take action to meet those needs, including granting authorities to minority-owned carriers. Rather, the Court of Appeals decision merely affirms the Commission position that where there is no showing that the transportation needs of the public would be served by the entry of a minority-owned carrier into the business of hauling automobile parts between automotive plants, minority ownership could not be used as a determinative factor to support a grant of authority.

If there was ever any doubt as to the Commission's position as to the role of minority ownership in application proceedings, such doubt was conclusively eliminated by the recent Commission decision in *Shippers Truck Service, Inc. - 19 States*, 125 M.C.C. 323 (decided August 11, 1976). In the *Shippers* decision, the Commission clearly restated its prior policies considering the role of racial and ethnic factors in applications for operating authority.

We believe that our prior policy of considering racial and ethnic factors only when they relate to the nature of the transportation service proposed by an applicant, and the public's need for that service, is correct.

* * *

In this connection, we again reject the contention of protestants that racial or ethnic factors can never be relevant to deciding an application for operating authority. * * * Thus, a motor carrier offering a service specifically tailored to cater to the requirements of a specific class of users may be granted authority based on its superior ability to meet the transportation needs of the group in question. In this proceeding,

> however, the applicant has made no such proposal. The recommended grant of authority was predicated solely on the race of applicant's president and owner, which fact relates in no way to the proposed transportation service. Accordingly, we cannot agree with the recommendation of the Administrative Law Judge. 125 M.C.C. at 330, 331.

Thus, if there was ever any uncertainty as to what the Commission meant in the *O-J* decision, that uncertainty has been conclusively eliminated by the Commission's decision in *Shippers*.

All of O-J's remaining arguments on minorities concern an alleged lack of minority representation in the ownership of motor carriers and the obligation of the Commission to redress imbalances in this area. However, in the absence of a showing that minority ownership would have a direct relationship to the transportation services involved in a particular application, the desirability of granting preference to minority applicants reflects a social judgment, rather than a judgment as to the public need for proposed additional transportation services under the Interstate Commerce Act. As was noted by the Court of Appeals below, even though minority-owned businesses may encounter problems in getting established, Congress has not chosen to require the Commission to consider minority ownership as a separate factor in determining public convenience and necessity. Even if the tenuous argument is made that an alleged lack of minority participation in the motor carrier industry has an adverse impact on that industry, such an

argument was never raised before the Commission in O-J. It is highly questionable whether the Commission could grant minority preferences under such an argument, and in view of the lack of any evidence or argument along these lines prior to the Petition for Certiorari, the Commission was obviously under no compulsion to accept such an argument.[2]

The Petition for Certiorari also seeks to have this Court consider the manner in which the Commission evaluated the standard transportation issues of public convenience and necessity in determining to deny the auto parts portion of the O-J application. The Commission's approach to these transportation issues is completely uncontroversial and in accord with many decisions of this Court and lower Federal courts. The Commission considered numerous factors in determining whether to grant the auto parts portion of the application, including the substantiality of the supporting shippers' need for an additional transportation service, the ability of existing carriers to provide service to these shippers, the participation of the protestant carriers in the traffic of these shippers and others within the scope of the application, and the potential impact of authorization of another carrier on the existing services of protestants. In particular, respondent carriers were shown to have a heavy interest in the loss of this vital automotive parts traffic from their lines, particularly on outbound movements from Detroit. Based on criteria stated in *Pan American Bus Line Operation*, 1 M.C.C. 190, 203 (1936) and repeated in countless decisions thereafter, the Commission weighed all of these factors and determined that no substantial public need for an additional service had been demonstrated. The Commission's basis for its denial is clearly stated in its report and, under standards

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[2]A similar argument was also rejected in *NAACP*. See 48 L. Ed. 2d at 292, footnote 7.

set forth in many Court decisions, cannot be said to be arbitrary and capricious. *Bowman Trans.* v *Arkansas-Best Freight*, 419 U.S. 281 (1974); *Feature Film Service Inc.* v *United States*, 349 F. Supp. 191 (SD, Ind., 1972); *Colorado-Arizona-California Express, Inc.* v *United States*, 224 F. Supp. 894 (D, Colorado, 1963); *Towne Service House Goods Transp. Co.* v *United States*, 329 F. Supp. 815 (WD, Texas, 1971). Similarly, under the well-established standards of judicial review, it cannot be said that the Commission's decision is unsupported by substantial evidence. *Mississippi Valley Barge L. Co.* v *United States*, 292 U.S. 283 (1934); *United States* v *Pierce Auto Freight Lines*, 327 U.S. 515, 536 (1946); *Malone Freight Lines, Inc.* v *United States*, 107 F. Supp. 946, 949 (ND, Ala., 1952), aff'd 344 U.S. 929 (1952); *Illinois Cent. R. Co.* v *Norfolk and Western R. Co.*, 385 U.S. 57, 69 (1966). Accordingly, there is no merit to O-J's contention that the Commission or the Court of Appeals have improperly considered the transportation issues in this case.

CONCLUSION

The decision of the Court of Appeals is clearly correct, and there is no basis for granting certiorari. Accordingly, the Petition for Certiorari should be denied.

Respectfully submitted,

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Intervenors.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Intervenors.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

STATEMENT OF THE CASE.

Petitioner's statement of the case is basically correct but requires minor clarification to present an accurate picture of the course of the proceedings below.

Petitioner makes mention of the testimony of the three shippers who supported the portion of its application which was denied by the Interstate Commerce Commission. In this discussion, Petitioner fails to note that no weight was given to the testimony of the General Motors witnesses by the Administrative Law Judge who heard the case, or by Division One of the Interstate Commerce Commission which subsequently reviewed the proceedings. Petitioner's recitation of the evidence offered by shippers Ford and AMC, concerning alleged deficiencies in existing carrier services, is an almost verbatim repetition of the record and not a summary of the evidence offered by these shippers. There was no specific evidence relating to this issue.

Further, Petitioner fails to acknowledge that Commissioner O'Neal, in his dissent, concurs with Commissioners Murphy and Gresham that the issue of minority group status should have no bearing on the present case. (See Page A-17 of O-J's Petition.)

With the inclusion of the foregoing clarifications, Petitioner's statement of the case can be considered correct and accurate and adopted by respondent Courier-Newsom as so clarified.

REASONS FOR DENYING THE WRIT.

Although Petitioner challenges the Commission's decision denying it a portion of the operating authority it sought on many grounds, contending that the Commission's decision is arbitrary and capricious and not supported by substantial evidence, Petitioner's primary argument is now, as it has been at all stages of this proceeding, that the Commission should have considered the factor of the minority ownership of Petitioner as an additional basis for granting the operating authority sought. This Court very recently rejected the type of argument presented by Petitioner herein in the case of *National Association for the Advancement of Colored People* v. *Federal Power Commission,* ..... U. S. ....., 96 S. Ct. 1806, 48 L. Ed. 2d 284 (1976).

I. The Scope of Judicial Review of Interstate Commerce Commission Decisions Is Extremely Limited.

A court's review of Interstate Commerce Commission action is limited to ascertaining whether the Commission's decision was rational and based upon substantial evidence. *Dart Transit Company* v. *United States,* 386 F. Supp. 1387 (1975) D.C.M.N.; *Ross Express, Inc.* v. *United States,* 529 F. 2d 679 (1976) CA1. If there is support in law and in fact for the Commission's action, the court cannot substitute its own judgment for that of the Commission. *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U. S. 515, 90 L. Ed. 821 (1946). The judicial function is exhausted when there is found to be a rational basis for the Commission's conclusions. Reviewing courts have no concern with the correctness of the Commission's reasoning, the soundness of its conclusions or with alleged inconsistencies with findings made in other proceedings. The weight to be given to evidence is to be determined by the Commission and not by the courts. There is a presumption that the Commission has properly performed its duties. *Norfolk Southern Bus, Corp.* v. *United States,* 96 F. Supp. 756 (1950), affirmed per curium, 340 U. S. 802.

As was stated by the three judge District Court in the case of *United Van Lines, Inc.* v. *United States,* 266 F. Supp. 586 (1967):

> "The criteria by which the I.C.C. chooses to make determinations of Public Convenience and Necessity may not be criticized by this Court unless they are found to be capricious or irrational. The scope given the I.C.C. is broad, and within this scope, the I.C.C. may choose criteria and weigh evidence of Public Convenience and Necessity as it sees fit."

indeed:

> "The fact that there is substantial evidence for other conclusions is not decisive (citation omitted). We are con-

cerned only with whether or not the evidence presented will support the conclusions actually reached by the I.C.C."

United Van Lines, supra.

Reviewing courts have consistently found that an Order of the Interstate Commerce Commission carries with it a presumption of validity and does not become suspect merely because it has been challenged. See: *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 512 (1944.)

II. The Interstate Commerce Commission's Decision in the Instant Case Is Supported by Substantial Evidence.

Petitioner contends that the Commission's decision is not supported by substantial evidence and buttresses this contention with the assertion that, contrary to law, the only factor considered by the Commission in its determination of the Petitioner's application was the adequacy of existing carrier services. The United States Court of Appeals for the Sixth Circuit found no merit to these contentions. See: *O-J Transport Company* v. *United States*, 536 F. 2d 126 (1976.)

The fact of the matter is that the adequacy or inadequacy of existing service is one of the several elements upon which the Commission may base its exercise of discretion in granting a Certificate of Public Convenience and Necessity. See: *Warren Transport, Inc.* v. *United States*, 525 F. 2d 148, 149 (1975) CA8.

The Commission's determination that existing carrier services were adequate to meet the shipping public's need is well founded. The record contains no specific complaints regarding the services of existing carriers but rather only broad allusions to the effect that carrier service might be better. As the Commission held in the case of *Chullino, Common Carrier Application*, 112 M. C. C. 737, 743:

> "A need for additional service is not established by general allegations of unsatisfactory service unaccompanied by evidence of specific instances of actual service failures."

Rather, the Commission requires that an applicant furnish specific examples of inadequacies in existing service in order to establish a *prima facie* case. *Jerry Lipps, Inc., Extension—Pipe*, 110 M. C. C. 113, 119. The Commission requires that there be an affirmative showing of a need for service based upon evidence of consistent or recurring inability to secure adequate and satisfactory service from existing carriers. *Wingate Trucking Company, Inc., Extension—Dogherty County*, 105 M. C. C. 475, 479. Petitioner herein made no such showing to the Commission.

The record before the Commission reflects that there is nothing new, unique or inherently superior about the service proposed by Petitioner herein when compared with the services presently available from existing motor carriers. All that the Commission was presented with was an apparent preference on the part of the shippers supporting Petitioner's application for Petitioner's service over that of existing carriers. As was held in the case of *Strickland Transportation Co., Inc., Purchase, New England Transportation Co.*, 104 M. C. C. 296, 325:

> "Preference is not a substitute for need where an area is served adequately by established carriers. The mere showing by an applicant of its own fitness and of the shipper's desire to use its proposed service are not sufficient of themselves to warrant a grant of authority sought . . ."

The Commission, in the case of *John Novak Contract Carrier Application*, 103 M. C. C. 555, established certain evidenciary standards or guide lines with which all applicants must comply in order to establish a *prima facie* case. These criteria require an applicant to set forth with specificity; the commodities to be shipped or received, the points to or from which traffic moves, what volume of traffic the supporting shippers would tender to the applicant if successful in its prosecution of the application, what transportation services the supporting shippers are currently utilizing, and what deficiencies, if any, there are in existing carrier services. These criteria were made applicable to

common carrier applications in the case of *Cloud Common Carrier Application,* 115 M. C. C. 77, 79 and later judicially approved and made applicable to cases heard on an oral record. See: *Richard Dahn, Inc.* v. *Interstate Commerce Commission,* 335 F. Supp. 337 (1971). These *Novak* criteria have found further judicial approval in the cases of *Dart Transit, Co.* v. *United States,* 386 F. Supp. 1387 (1975) and *Ross Express, Inc.* v. *United States,* 529 F. 2d 679, 682 (1976) CA1.

The requirements of *Novak, supra,* are a minimum showing which must be made by an applicant in order to establish a *prima facie case.* All five minima are required, not any one or any combination short of the five. If an applicant's presentation is deficient insofar as any of the five *Novak* criteria are concerned, the application must be denied. See: *Little Audry's Transportation Co., Inc., Extension—Frozen Foods,* 120 M. C. C. 467, 475. The record which Petitioner made before the Commission is woefully deficient insofar as the *Novak* criteria are concerned. Petitioner's failure to meet its burden of proof left the Commission in a position where it did not have before it substantial evidence upon which it might have justified a decision to grant the authority Petitioner sought.

It is the Commission's duty to determine whether a newly proposed service will serve a useful public purpose responsive to a public demand or need, whether this purpose can be as well served by existing carriers and whether it can be served by applicant with the new operation proposed without endangering or impairing the operations of existing carriers. See: *Pan American Bus Lines Operation,* 1 M. C. C. 190, 203. As noted above, there was no demonstration of any public demand or need which Petitioner's proposed service was tailored to meet. Moreover, the record before the Commission reflects that existing carriers experience an imbalance of traffic terminating in the Detroit area and have a need for additional traffic outbound from Detroit to balance their operations. The Commission recognized that the authorization of Petitioner to

conduct its proposed operations would impair the viability of the operations of existing carriers, contrary to the public interest.

Petitioner argues that the approval of its application would have a minimal effect upon existing carriers because it would be tendered a minimal amount of traffic by the shippers which supported its application. There is no guarantee that this would always continue to be the case and that Petitioner's operations would not grow. It would be impermissible for the Commission to place any restriction upon the growth of Petitioner's operations once it had approved Petitioner's application. The Commission previously rejected such an argument in the case of *Karl Weber, Extension—Lumber,* 112 M. C. C. 552, 556.

Petitioner argues that since the Ford Motor Company has offered evidence of traffic moving to Detroit from Chicago as well as from Detroit to Chicago, that the approval of its application will not have any significant affect upon the balanced or unbalanced nature of the operations conducted by existing carriers. By this argument apparently Petitioner is asking the Court to substitute its judgment for that of the Commission in the weighing of evidence, contrary to established legal principles. See: *United States* v. *Pierce Auto Freight Lines, Inc., supra,* and *Norfolk Southern Bus Corp.* v. *United States, supra.*

There can be no doubt as to correctness of the finding by the U. S. Court of Appeals for the Sixth Circuit that the Commission's denial of Petitioner's application was supported by substantial evidence when viewing the record as a whole. In fact, the conclusion reached by the Commission is the only one which the record will support.

III. The Interstate Commerce Commission's Decision in the Instant Case Is Not Arbitrary or Capricious.

As this Court stated in the case of *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U. S. 281, 42 L. Ed. 2d 447, 95 S. Ct. 438 at 419 U. S. 285:

> "Under the 'arbitrary and capricious' standard the scope of review is a narrow one. . . . the Court is not empowered to substitute its judgment for that of the agency."

This court went on to state at pages 285 and 286 of its decision in *Bowman, supra,* that:

> "The agency must articulate a 'rational connection between the facts found and the choice made.' (citation omitted.) While we may not supply a reasoned basis for the agency's action that the agency itself has not given (citation omitted), we will uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned. (citation omitted)"

There was no error in judgment on the part of the U. S. Court of Appeals for the Sixth Circuit in finding that the record discloses in the Commission's findings, a weighing of competing interests in a determination that the adverse affect upon existing carriers would outweigh any benefit to the public if Petitioner's application had been approved. As the Circuit Court noted, this is precisely the type of judgment which the Commission is required to exercise. Clearly then, there was a rational basis for the Commission's denial of Petitioner's application for operating authority. Once a rational basis is found for the Commission's Order, then the Commission's action can be considered neither arbitrary nor capricious. See: *Messinger* v. *United States,* 300 F. Supp. 1336 (1969) and *Navajo Freight Lines, Inc.* v. *United States,* 320 F. Supp. 318, 320 (1970).

IV. In the Instant Case, Petitioner's Minority Group Status Is Not a Factor Which the Interstate Commerce Commission Could Have Properly Considered in Its Determination of Petitioner's Application for Operating Authority.

The main thrust of O-J's argument in its Petition to this Court is, as it has been since the inception of O-J's application, that because of the racial minority group membership of the owners of O-J, O-J is entitled to some special consideration

not given to other applicants for motor carrier operating authority.

Petitioner asserts that 49 U. S. C. § 307(a), which provides for the issuance of motor common carrier operating authority to the extent that a proposed service is or will be required by the present or future public convenience and necessity, is the basis upon which such special consideration of minority group applications can be predicated. It asserts that the public convenience and necessity will be best served when minority group members become the holders of motor carrier operating authorities and the effects of past discrimination against minorities in the business world are eradicated. Petitioner interprets the language "public convenience and necessity" found in 49 U. S. C. § 307(a) as a broad license for the Interstate Commerce Commission to promote the general public welfare.

This Court has recently rejected such an argument in the case of *National Association for the Advancement of Colored People* v. *Federal Power Commission,* ..... U. S. ....., 96 S. Ct. 1806, 48 L. Ed. 2d 284 (1976). At 48 L. Ed. 2d 291, this Court stated that:

> "This Court's cases have consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation.
>
> For example, in the case of the Interstate Commerce Commission, which is responsible for enforcing an act 'designed to assure adequacy in transportation service,' 'the term public interest is not a concept without ascertainable criteria, but has direct relation to the adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and the best use of transportation facilities . . .' (citations omitted)."

Quite clearly then, there is nothing in the Interstate Commerce Act which authorizes the Interstate Commerce Commission to give special consideration to minority applicants, merely

because of their minority status, when such individuals come before the Commission seeking operating authorities.

Ethnic factors can only play a part in the issuance of new operating authorities when they relate to the transportation needs of the persons or groups which a proposed transportation service is designed to serve. As the Commission found in the case of *Elegante Tours, Inc. Broker Application,* 113 M. C. C. 156, 160:

> "Consistent with our statutory responsibilities, some grants of authority are made either where a need has been shown to serve a particular class of users of a proposed service or where it has been shown that a distinctive kind of service would fulfill a demonstrated need. That is to say, if existing services are not providing an adequate service to any segments of the public, a grant of authority to an applicant to cure this defect does not evince a descriminatory grant but is, instead a grant to provide a needed service."

The ethnic considerations involved in the instant case have nothing whatsoever to do with the transportation needs of any element of the shipping public. Rather, Petitioner argues that in 1935, when the Motor Carrier Act was initially made effective, existing motor carrier were issued certificates of authority without being required to prove that any public need for their services existed. Petitioner argues that since there were very few black owned businesses in 1935, including trucking companies. the Commission's regulation of the motor carrier industry has perpetuated the effects of economic discrimination against blacks, and, accordingly the Commission should now be required to give special consideration to black applicants for motor carrier operating authority. The flaw in this line of reasoning is that it was Congress, and not the Commission, which set the standards by which the Commission must regulate the motor carrier industry. The Congress, when it enacted 49 USC § 306(a), determined that anyone conducting operations as a common carrier by motor vehicle on June 1, 1935 could receive a certificate from the Commission to conduct such

operations as were conducted on that date, without having to prove a public need for such a service. If blacks have been unfairly excluded from ownership positions in the motor carrier industry, it has been by Act of Congress and not due to Commission policy in regulating the motor carrier industry. Quite clearly then, the relief which Petitioner seeks can come only from Congress.

Petitioner also points to certain language of the National Transportation Policy, found at 49 USC preceding § 301, in support of its argument that black applicants are entitled to special consideration when they come before the Commission seeking operating authorities. The pertinent portion of the National Transportation Policy provides:

> "It is hereby declared to be the National Transportation Policy of the Congress to provide for fair and impartial regulation of all models of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote, safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; . . ."

Petitioner grasps the language "fair and impartial regulation" as manifesting congressional intent that the Commission eradicate any racial inequities which may exist in the ownership of motor carrier operating authorities. There might be some merit to this argument if the National Transportation Policy ended after the words "impartial regulation", however, it does not. This language relates to equal treatment of all modes of transportation; rail, motor, water, etc.

This particular language of the National Transportation Policy imposes a duty upon the Commission to regulate all modes of transportation fairly and impartially so as to preserve the inherent advantages of each mode of transportation and not to favor one mode of transportation over another. See: *Atlantic Coast Line R. Co.* v. *United States,* 265 F. Supp. 549 (1967). Of particular interest to the case at hand is the observation

of the three judge District Court in *Atlantic Coast Line, supra,* that if any of the statutory provisions of the Interstate Commerce Act are unfair, it is for Congress to correct the unfairness.

Clearly then, in the instant case, Petitioner's minority group statuts is not a factor which could properly play any role in the Interstate Commerce Commission's determination of Petitioner's application for motor carrier operating authority.

CONCLUSION AND PRAYER.

When viewing the record as a whole, there is substantial evidence to support the Commission's denial of O-J's application. The Commission's denial of O-J's application was neither arbitrary nor capricious. Further, this Court has recently rejected an argument identical to that made by Petitioner, herein that the Commission is required to consider the public welfare in the general sense as it goes about its appointed task of implementing and enforcing the Interstate Commerce Act.

For the foregoing reasons the Petition for a Writ of Certiorari should be denied by this Court.

Respectfully submitted,

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No. 76-317

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O-J TRANSPORT COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A25-A36) is reported at 536 F. 2d 126. The report and order of the Interstate Commerce Commission (Pet. App. A8-A22) are reported at 120 M.C.C. 699. The final order of the Commission (Pet. App. A23-A24) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1976. The petition for a writ of certiorari was filed on September 1, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 206(a)(1) and 207(a) of the Interstate Commerce Act, as added, 49 Stat. 551-552, and amended, 49 U.S.C. 306(a)(1) and 307(a), and the Statement of the National Transportation Policy, 49 U.S.C. preceding 301, are set forth in Appendix E to the petition (Pet. App. A37-A39).

QUESTION PRESENTED

Whether in making a public convenience and necessity determination the Interstate Commerce Commission is required to consider the minority racial status of the owners of the applicant company absent some showing that racial status will affect the transportation needs of the public.

STATEMENT

This petition arises out of a "public convenience and necessity" determination pursuant to Section 207(a), 49 U.S.C. 307(a), with respect to a motor common carrier license. In April 1973, two black entrepreneurs seeking to do business as O-J Transport Company applied to the Interstate Commerce Commission for authority to transport: (A) automobile parts between, on the one hand, four Michigan counties adjacent to Detroit, Michigan, and, on the other, Chicago, Illinois, and Janesville, Kenosha, and Milwaukee, Wisconsin; and (B) malt beverages between Milwaukee and Detroit (Pet. App. A1-A2). Hearings were held and an administrative law judge recommended that the Commission grant substantially all of the authority requested (Pet. App. A1-A7).

On exceptions, the Commission's Division 1 agreed that the malt beverages authority should be granted[1] but

[1]This aspect of the Commission's decision was not challenged before the court of appeals and is not at issue here.

denied petitioner's application insofar as it sought authority to transport auto parts. In making its public convenience and necessity determination regarding the need for an additional carrier authorized to transport auto parts, the Commission refused to consider evidence of petitioner's ownership by members of a particular minority group (Pet. App. A13-A14). On the basis of the remaining evidence, the Commission found that petitioner had failed to demonstrate a specialized or general public need for its proposed auto parts service, that the thirteen protesting carriers were capable of satisfying the area's auto parts transportation requirements for the present and reasonably foreseeable future, and that existing carriers were suffering from an imbalance of traffic in the Detroit area and needed additional traffic out-bound from Detroit to balance their operations (Pet. App. A13-A15).[2]

On petition for review, the court of appeals rejected petitioner's arguments relating to the adequacy of the Commission's findings and the substantiality of the evidence and affirmed the Commission's decision that evidence of petitioner's minority ownership was not a proper consideration in resolving the license application in this case (Pet. App. A25-A36).

ARGUMENT

The only issue of arguable significance raised by the petition[3] is whether the Commission is required to consider the minority racial status of an applicant company's

[2]Commissioner O'Neal dissented from the decision by Commissioners Murphy and Gresham as to the need for the proposed service but agreed that the issue of minority group status had no bearing on the license application in this case (Pet. App. A16-A18).

[3]Petitioner's arguments relating to the adequacy of the Commission's findings and the substantiality of the evidence were properly rejected by the court of appeals (Pet. App. A27-A31). With particular

owners in the absence of any showing that racial status will affect public transportation needs. Petitioner argues that the public convenience and necessity standard requires Commission cognizance of minority ownership so that the Commission may "provide them [the minority group] with redress from an earlier opportunity from which they were excluded * * *" (Pet. 18).[4] The theory that public interest mandates in regulatory statutes provide a directive to eradicate racial discrimination was recently rejected by this Court in *NAACP* v. *Federal Power Commission*, No. 74-1608, decided May 19, 1976. In that case petitioners argued that the Federal Power Commission erred in refusing to adopt a broad rule "requiring equal employment opportunity and nondiscrimination in in the employment practices of its regulatees." Slip op. 1. This Court held that the Commission is authorized to consider the consequences of discriminatory employment practices on the part of its regulatees

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reference to this Court's decision in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293, the court of appeals held that the Commission's findings reflect "a weighing of competing interests and a determination that the adverse effect upon existing carriers of granting the application would outweigh any benefit to the public disclosed by the applicant's evidence" (Pet. App. A30-A31). Petitioner's challenge to these findings does not warrant plenary consideration in view of the exhaustive treatment of the same subjects by this Court in *Bowman, supra*. Cf. *Ralston Purina Co.* v. *Louisville & N.R. Co.*, No. 75-1015, decided June 14, 1976.

[4]Petitioner does not suggest that the Commission discriminates against minority-owned applicants in administering the certificate provisions of the Interstate Commerce Act. Instead, petitioner apparently contends (Pet. 15) that, because "grandfather" certificates were issued to existing carriers at a time when black business ownership was rare, the present colorblind administration of the Act limits participation by minorities in the trucking industry. Even assuming this to be true, the remedy lies with Congress rather than the Commission.

insofar as such consequences are directly related to the establishment of just and reasonable rates, but that the use of the words "public interest" in the Natural Gas and Federal Power Acts does not give the Commission authority to seek to eradicate employment discrimination. The Court further held that "use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare." Slip op. 7.

The court of appeals in the instant case correctly concluded that the rationale of *NAACP* v. *Federal Power Commission* is equally applicable to the public convenience and necessity determinations of the Interstate Commerce Commission. The ICC is charged with the enforcement of legislation that relates specifically to transportation facilities, problems and services, and the policies expressed in that legislation "must be the basic determinants of its action." *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80. As the court below concluded, the public interest the Commission is charged with furthering relates to "systems of transportation which are safe, adequate, economical and efficient" (Pet. App. A34). See *NAACP* v. *Federal Power Commission, supra*, slip op. 7; *New York Central Securities Corporation* v. *United States*, 287 U.S. 12, 24-25; *McLean Trucking Co.* v. *United States, supra*, 321 U.S. at 79.

Evidence of ownership by a particular ethnic group may warrant consideration when such evidence is directly related to the public's transportation needs (Pet. App. A36). See *National Bus Traffic Association, Inc.* v. *United States*, 284 F. Supp. 270 (N.D. Ill.), affirmed *per curiam*, 391 U.S. 468; *Elegante Tours, Inc.—Broker Application*, 113

M.C.C. 156, 160.[5] While affirming the Commission's decision excluding considerations of race in this case, the court of appeals made clear that in a proper case racial or ethnic ownership may "play a role in the determination of whether to grant authority * * *" (Pet. App. A36). However, there was no showing by petitioner here that the entry of a carrier owned by members of a particular minority group into the auto parts hauling business in the particular area covered by petitioner's application would better serve the transportation needs of the public. As the court of appeals determined: "we find it [racial status] was not a proper consideration in the present case because it was totally unrelated to the transportation needs of the public" (Pet. App. A36).

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[5]Although on the Commission level this point may have been obscured somewhat by the broad language used by the majority of Division 1 (Pet. App. A36), the entire Commission (one Commissioner not participating) recently reasserted its authority to consider racial or ethnic factors where related to transportation needs. *Shippers Truck Service, Inc. Extension—19 States*, 125 M.C.C. 323.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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